

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE WESTERN DISTRICT OF MICHIGAN  
3 SOUTHERN DIVISION

4 WINERIES OF THE OLD MISSION  
5 PENINSULA ASSOC. (WOMP), a Michigan  
6 non-profit corporation; BOWERS HARBOR  
7 VINEYARD & WINERY, INC., a Michigan  
8 corporation; CHATEAU GRAND TRAVERSE,  
9 LTD., a Michigan corporation; CHATEAU  
10 OPERATIONS, LTD., a Michigan corporation;  
11 GRAPE HARBOR, INC., a Michigan  
12 corporation; MONTAGUE DEVELOPMENT, LLC, a  
Michigan limited liability company; OV THE  
FARM, LLC, a Michigan limited liability  
company; TABONE VINEYARDS, LLC, a Michigan  
limited liability company; TWO LADS, LLC, a  
Michigan limited liability company; VILLI  
MARI, LLC, a Michigan limited liability  
company; WINERY AT BLACK STAR FARMS, LLC,  
a Michigan limited liability company,

13 Plaintiffs,

14 v Case No: 1:20-cv-1008

15 PENINSULA TOWNSHIP, a Michigan  
16 municipal corporation,

17 Defendant,

18 and

19 PROTECT THE PENINSULA, a Michigan  
municipal corporation,

20 Intervenor-Defendant.

21 /

22 CLOSING STATEMENTS

23 BEFORE THE HONORABLE PAUL L. MALONEY  
24 United States District Judge

25 Kalamazoo, Michigan  
Monday, October 28, 2024

1 APPEARANCES:

2 For the Plaintiff: MR. JOSEPH M. INFANTE  
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1 Kalamazoo, MI

2 | October 28, 2024

3 9:30 a.m.

## 4 RECORD

5 THE COURT: This is File Number 20-1008, Wineries of  
6 Old Mission Peninsula versus Peninsula Township and Protect  
7 the Peninsula. The record should reflect that Attorneys  
8 Infante, Ragatzki, Kaltenbach, and Gartman represent the  
9 plaintiffs. Attorneys Rajsic and McGraw represent Peninsula  
10 Township. Attorney Holly Hillyer represents Protect the  
11 Peninsula.

12                   The Court conducted a nonjury trial in this matter  
13                   several months ago. There was a request to have the  
14                   transcripts prepared before the filing of post-trial briefs.  
15                   That has all been accomplished, and the Court's here to hear  
16                   this morning the -- take final argument on the case.

17 So with that introduction, Mr. Infante, on behalf of  
18 plaintiffs, go ahead, sir.

19 MR. INFANTE: Thank you. Good morning, your Honor.  
20 Joe Infante on behalf of plaintiffs.

21           Yes, it has been -- I think my last line of my opening  
22        was that it was a long road to trial. We have -- it's been  
23        four years and seven days exactly from the time that we filed  
24        the complaint in this case. There have been approximately  
25        600 -- over 600 documents filed in this case. We were set to

1 go to trial approximately two years ago, a little more than  
2 two years ago, and PTP's intervention set us back about a  
3 year.

4 But we had a trial over 10 days in April and May. That  
5 trial was interesting for what happened during trial. The  
6 witnesses that happened. So the wineries -- we presented 12  
7 fact witnesses at trial. These were winery representatives,  
8 one from each and two from Black Star. We had four witnesses  
9 by deposition designation. Those were Township officials, the  
10 planner, the former attorney, former supervisor, and the  
11 former zoning administrator. Three expert witnesses, one Eric  
12 Larson on damage, one Teri Quimby, a former commissioner from  
13 Liquor Control Commission, Gary McDowell, the former executive  
14 director of the Michigan Department of Agriculture.

15 But PTP came in this case and set us back two years, but  
16 then when it came time for trial, neither PTP nor Peninsula  
17 Township called a single live fact witness. You didn't hear  
18 from a single member of PTP. You didn't hear from a single  
19 Township official live at trial.

20 They did submit three witnesses by deposition  
21 designation. One of those was a Township official, the former  
22 planner, and two PTP members, John Wunsch, Grant Parsons.  
23 That testimony, that testimony was on the issue of Central  
24 Hudson factors. It was not on -- wasn't to rebut any of the  
25 testimony of the wineries, about their wineries, the effect of

1 the ordinances, how they acted, enforcement, it wasn't on  
2 those issues at all. On that, the winery evidence was  
3 unrebutted.

4 Those winery witnesses who appeared live at trial, they  
5 were credible. They told this Court about their businesses,  
6 how they operate. They looked this Court in the eye, and they  
7 explained to the Court, you know, how their businesses  
8 operate, their need to have additional activities and  
9 value-added agriculture, the harm that has been done to them.

10 The defendants, I shouldn't say the defendants, PTP  
11 called one witness at trial, Dr. Daniels, who was a land use  
12 planning expert from Pennsylvania. He was evasive in his  
13 testimony. He was argumentative in his testimony. He snapped  
14 at one point, and this Court struck that from the record. He  
15 didn't look your Honor in the eye. He looked down for most of  
16 his testimony. He wasn't credible, and we'll get into his  
17 testimony.

18 Because of the Court's pretrial rulings, summary judgment  
19 findings, there really were three issues left for trial. One,  
20 whether the winery ordinances violate the wineries' commercial  
21 speech rights; whether those winery ordinances caused the  
22 winery to suffer damages, not just on commercial speech but  
23 because of some of this Court's pretrial rulings, essentially  
24 the causation element in this case, and then the last is the  
25 issue of the damages that the wineries are entitled to and

1 what other relief they're entitled to by way of injunctive  
2 relief.

3 I plan to discuss these each in turn this morning. On  
4 commercial speech, so at the summary judgment phase, this  
5 Court did not seem convinced that everything the wineries want  
6 to do here or seek to do was commercial speech, but now after  
7 10 days of trial, 12 unrebuted winery witnesses, it should be  
8 abundantly clear that what these wineries do and what they  
9 want to do at their wineries is commercial speech. It is  
10 intended to promote, advertise, and market the sale of the  
11 wines that these wineries make from grapes that they grow. We  
12 believe this easily meets the Bolger factors. One, they  
13 advertise the wine for sale, and I'll go through the evidence.  
14 They refer specifically to wine produced by these wineries,  
15 which are for sale. Again, the evidence was that these  
16 wineries can only sell wine that they make from grapes, well,  
17 grapes either they grow or they source, and that the wineries  
18 and their staff are economically motivated to advertise the  
19 sale of their products.

20 Obviously the wineries are economically motivated because  
21 they're in the business of making and selling wine. But you  
22 heard testimony from these winery representatives that their  
23 staff is incentivized also to push the sale of wine and sell  
24 wine. They're incentivized to get customers at activities and  
25 through the tasting room to sign up for their wine club, which

1 is a subscription service, and their staff earns bonuses when  
2 they get people to sign up.

3 During my opening statement, I advised the Court that  
4 there are certain things that we would prove at trial, certain  
5 evidence this Court would hear. These bullet points here,  
6 these are actually copy and pasted from my opening, because we  
7 did this. We proved each of these. We proved that  
8 promotional activities always include advertising promotion of  
9 these wineries' wines.

10 The best form of promotion and advertising for their  
11 businesses occurs when they have a captive audience at their  
12 winery through these group activities. Promotions and  
13 educational materials have a greater effect on customers and  
14 activities than general tasting room visitors, just  
15 through-the-door visitors. Wine club sales are higher --  
16 sorry, wine sales are higher during promotional activities.  
17 Wine club signups are higher during promotional activities.  
18 Group reservations, these, you know, the groups that come in,  
19 these, for whatever reason, these provide the wineries with a  
20 target-rich environment.

21 Now, this all went in unrebutted. The Township didn't  
22 have a witness; PTP didn't have a witness on any of these  
23 issues here. And even through cross examination, Peninsula  
24 Township proved this themselves through their cross  
25 examination. I remember sitting here listening to questions

1 by Mr. Rajsic, he asked Mr. Oosterhouse, I think it was the  
2 first or second day of trial, he said, quote, "Groups that  
3 come in for tastings, you pitch your products to those groups,  
4 right?" He answered, "Yes." He asked Mr. Lagina about the  
5 reasons for having musicians at Villa Mari, and he said --  
6 this is what the question was: That's what the goal of  
7 enticing people in the door to taste your wine and sell them  
8 wine, and Mr. Lagina answered, yes, that's the reason we do  
9 these things.

10 Peninsula Township counsel asked some variation of this  
11 product pitch question about 25 times. I went through the  
12 transcript and counted it. About 25 times they asked the  
13 wineries about how they pitch their products and that they  
14 pitch their products during group activities. Pitching  
15 products, that's just advertising and marketing. It's trying  
16 to sell wine.

17 It's unrebutted that sales through a winery tasting room  
18 are the wineries' best form of marketing and advertising.  
19 Just for your Honor's reference, ECF 618, that's our  
20 post-trial brief. We consolidated a lot of testimony in our  
21 post-trial brief, so this is -- when it says ECF 618, I'm  
22 citing multiple pages of the trial brief. Or post-trial  
23 brief.

24 It's unrebutted the wineries are able to more effectively  
25 deliver their advertising message in person at their tasting

1 room, and in-person marketing and advertising occurs at the  
2 tasting room. For example, Spencer Stegenga from Bowers  
3 Harbor, he testified that for Bowers Harbor their marketing  
4 message is, quote, "Welcome to our family farm and family  
5 home." And he testified that this message is most effectively  
6 given in person at their winery at their tasting room when  
7 they have groups come in.

8           It's unrebutted that the wineries market their business  
9           through their wine clubs, which are a subscription service.  
10          They get deliveries three to four times a year I believe was  
11          the average testimony there. These wine clubs create brand  
12          ambassadors for the wineries and that wine club members  
13          purchase more wine than nonwine club members.

14 You heard testimony how important these wine clubs are  
15 because they get them through the slow season. They actually  
16 scheduled the deliveries for wine clubs so that they can get  
17 that income during the slow season, which in northern Michigan  
18 is typically in the winter.

19           Nearly all the wine club signups occur in person, and the  
20        winery staff are trained and incentivized to get people to  
21        sign up for the wine club. Bill Maier from Hawthorne, he  
22        testified that 99 percent of their wine club members signed up  
23        in person at the tasting room. For Brys, Patrick Brys, he  
24        testified that that number is 95 percent. They testified they  
25        need to get people into their tasting room to get them to sign

1 up for these wine clubs.

2 It's unrebutted that events at wineries help the wineries  
3 sell more wine, plant more grapes, and keep their land and  
4 agriculture. The purpose of the wineries hosting events, that  
5 purpose is to sell more wine. That is the sole purpose. The  
6 testimony was the sole purpose of having events is to sell  
7 wine, advertise wine, market wine. And the wineries sell more  
8 wine and get more wine club signups on days when they host  
9 these events.

10 Alex Lagina, he testified about a 5K race that they had  
11 at their winery just before trial, and it was on a Sunday. He  
12 testified that the sale of wine on that day was double from  
13 the prior Sunday one week before.

14 You also saw Mr. Lagina, that he provided the Court with  
15 some invoices for some group events that they had, and one was  
16 for a writer series and one was for I think it was a mining  
17 company or a mining group. And he testified that at those  
18 events, we saw the invoices, that Villa Mari sold hundreds of  
19 glasses of wine and bottles of wine -- not hundreds of  
20 bottles, but many bottles of wine at those events, and those  
21 were fantastic days for Villa Mari because they had that group  
22 come in during their slow season.

23 It's unrebutted that events are a better marketing  
24 opportunity for these wineries than regular tasting room  
25 operations. Events are hands-on marketing experiences for the

1                   wineries they are promoting, the wines they make and sell.

2                   Again, getting even to the cross examination by Mr. Rajsic, he  
3                   confirms that at these events the wineries are pitching their  
4                   products.

5                   It's unrebutted that hosting events would allow the  
6                   wineries to bring in more customers again during their slow  
7                   season. Service, marketing, promotion by a winery at, say, a  
8                   501(c) (3) event, which some of the wineries are allowed to  
9                   have under the ordinance, they testified that the same  
10                   service, marketing, and promotion occurs at things like  
11                   birthday parties, family reunions, wedding rehearsals, or  
12                   corporate meetings. It doesn't matter to the wineries the  
13                   reason for the group to come in or who the group is. They're  
14                   still going to promote and pitch their products.

15                   Winery events are essentially product demonstrations.  
16                   Again, Spencer Stegenga, he testified that product  
17                   demonstrations are what we do at Bowers Harbor.

18                   At events, wineries and their staff provide customers  
19                   with tasting notes, food pairing recommendations, they solicit  
20                   wine sales, they solicit wine club signups, and they engage in  
21                   product demonstrations. You heard several of the wineries  
22                   talk about the five Ss and that they walk customers through  
23                   the 5s: See, swirl, smell, sip, savor. They walk them  
24                   through those. That's a product demonstration.

25                   Todd Oosterhouse testified that, quote, "Intent of events

1 is to get those people at the event to buy more bottles."

2 Alex Lagina testified, quote, "For the people that are at the  
3 promotional activity, the purpose is to sell them wine."

4 It's unrebutted the wineries need to host these events to  
5 keep their land in agriculture and support their efforts to  
6 preserve agriculture in Peninsula Township. Without added  
7 avenues to sell their wines, some of these wineries are  
8 considering selling their land for housing developments. The  
9 ordinances themselves are inhibiting the wineries from  
10 investing in more farm land and more grapevines.

11 You heard testimony I know from Patrick Brys and I  
12 believe from Eddie O'Keefe, they have hundreds of thousands,  
13 if not millions of dollars, of wine sitting in warehouses,  
14 sitting in inventory that they need to find a place to sell  
15 that. They need more customers coming through their door so  
16 they can sell them that wine.

17 Hawthorne, Bill Maier testified that Hawthorne's, quote,  
18 "Plan B is to subdivide the property for residential  
19 development." Chris Baldyga explained that he's already  
20 talked to a residential developer or a housing developer about  
21 what he can do with his farmland if his business does not  
22 become profitable. And Mari, Alex Lagina, he testified that  
23 their ability to invest in more agriculture is dependent on  
24 them being able to have these promotional activities. His  
25 father, Marty Lagina, he testified Marty Lagina owns about 500

1                   acres of agricultural land in Peninsula Township, and some of  
2                   that was earmarked for more grapevines or another winery, and  
3                   instead they started subdividing that land for housing.

4                   Because these ordinances restrict commercial speech,  
5                   Peninsula Township had the burden of proof on the Central  
6                   Hudson test. They had to identify a substantial governmental  
7                   interest. They had to show how these regulations directly  
8                   advanced that governmental interest in a material way, and  
9                   they had to show the regulations are not more extensive than  
10                  necessary to serve that purpose. Peninsula Township didn't  
11                  meet this test.

12                  On substantial governmental interest, Peninsula Township  
13                  alleged that the interest is the preservation of agriculture.  
14                  In a nutshell, the preservation of agriculture. Supervisor  
15                  Manigold, he testified that this means, quote, "Keeping farms  
16                  profitable so they don't become houses and subdivisions."

17                  Post-trial the Township and PTP have argued that there's  
18                  this general health, safety, and welfare interest. The  
19                  purpose behind the winery ordinances. Now, this is unstated  
20                  in their brief what this means. Now, the Township did make  
21                  this same argument in our first summary judgment hearing.  
22                  They cited to Section 2.1 of the winery ordinances to say that  
23                  they have this health, safety, and welfare purpose. Your  
24                  Honor in response said, that's boilerplate. But even on this,  
25                  there's no evidence that these ordinances do promote health,

1 safety, and welfare. Supervisor Manigold, he testified that  
2 none of the ordinances address a health, safety, or welfare  
3 issue.

4 The defendants didn't admit any evidence here, right?  
5 Pretrial, Peninsula Township alleged that there's a whole host  
6 of these harms and these horrible things that would happen:  
7 Noise, traffic, and decreased agriculture. They didn't call  
8 any trial witnesses on these allegations. They relied mostly  
9 on attorney argument and then these meeting minutes. They  
10 subnoticed this Court a whole host of meeting minutes, but  
11 that doesn't meet their burden to show that these harms are  
12 real. And I'll discuss those meeting minutes in a minute, but  
13 you didn't have a Township official sitting here before you  
14 and discussing, you know, why these harms are actually real.  
15 You didn't have any evidence that they're actually real.

16 The township supervisor, Mr. Manigold -- sorry, I should  
17 say the former supervisor as of about two years ago just to be  
18 accurate. I apologize. He was the supervisor, though, for  
19 about 30 years, I believe, in Peninsula Township. He  
20 testified that the winery ordinances do not further the  
21 governmental interest of preserving agriculture. That's the  
22 testimony before this Court.

23 There's no record evidence of any studies, empirical  
24 data, or professional literature that Peninsula Township  
25 considered at the time that they passed these ordinances

1 showing that they, you know, the interest of preserving  
2 agriculture, one, that it's actually advanced by the  
3 ordinances, but two, that that harm is real, that preservation  
4 of agriculture, the land in Peninsula Township, needed  
5 preservation. There's no evidence that it actually needs  
6 preservation. At most, there's evidence that they want  
7 preservation but not that it actually, you know, if they don't  
8 have these ordinances, it won't be preserved. All they have  
9 is these historical meeting minutes. And Peninsula Township  
10 claims that these meeting minutes do, you know, all the  
11 lifting necessary to meet Central Hudson with the assistance  
12 of Dr. Daniels, who wasn't their witness.

13 But if these meeting minutes were so important, why  
14 didn't Dr. Daniels look at them? He testified he didn't  
15 review a single meeting minute. No planning commission  
16 meeting minutes, no town board meeting minutes. If they're so  
17 crucial to the case, if they do all the, quote, "lifting  
18 necessary," then why did the only live witness by the  
19 defendants not look at them? Well, that's because PTP's  
20 counsel didn't tell them to. He testified that he only looked  
21 at whatever PTP's counsel told him to review.

22 And I'll note for the Court, pretrial you, in one of your  
23 summary judgment -- sorry, it was a motion in limine ruling,  
24 you said that the defendants couldn't just put in front of you  
25 a whole host of meeting minutes and ask the Court to find

1 evidence in those meeting minutes. That's what they did.  
2 They just submitted meeting minutes without explanation, and  
3 they rely on attorney argument after the fact to interpret  
4 those meeting minutes.

5 I'll note if you look at their post-trial briefing,  
6 there's no quotes from those meeting minutes. They have a  
7 whole bunch of bullet points, but all it is is attorney  
8 argument of what those meeting minutes mean, what they  
9 interpret them to mean.

10 They were required to come forward with some quantum of  
11 evidence of both the governmental interest and that the  
12 ordinances advanced that to a material degree. The minutes,  
13 at most, contain speculation. At most. And the Aptive  
14 (phonetic) case said speculation of fears is woefully  
15 insufficient to meet the burden.

16 These statements are also hearsay. We objected at trial  
17 to the admission of these meeting minutes because they  
18 contained hearsay. They're out-of-court statements.  
19 Mr. McGraw said they're not being offered for the truth of the  
20 matter asserted. That's at ECF 608. If they're not being  
21 offered for the truth of the matter asserted, then why do we  
22 even have the meeting minutes? What's the point of them? If  
23 they're so important, why are they not admitting them as being  
24 truthful? Because they just contain hearsay. They should be  
25 inadmissible.

1                   The last factor under Central Hudson is the least  
2 restricted means or narrow tailoring, depending on the court  
3 case you're reading, how they're addressing the Central Hudson  
4 test. But Supervisor Manigold, he testified that Peninsula  
5 Township did not consider any less restrictive means when it  
6 passed these ordinances. You haven't seen any evidence of any  
7 less restrictive means. Peninsula Township didn't admit into  
8 evidence any draft ordinances, any drafts they considered  
9 before they ended up with the final ordinance. That's not in  
10 the record. You have to assume it just doesn't exist.

11                  Dr. Daniels, he testified that he wasn't giving an  
12 opinion on this issue. That wasn't something that he was  
13 going to address. But Gary McDowell, the former executive  
14 director of MDARD, he did testify that there are less  
15 restrictive means. The farm market GAAMPs he said are  
16 absolutely -- they absolutely help farmers preserve  
17 agricultural land. He said agriculture in Michigan is  
18 preserved when farms are allowed to engage in value-added  
19 agriculture such as on-farm events and promotions and that  
20 agriculture is preserved when the farmers have fewer  
21 restrictions rather than more restrictions.

22                  Dr. Daniels, he really wasn't competent to testify on the  
23 Central Hudson factors. Again, the Township claims the  
24 meeting minutes are the most important piece of evidence, but  
25 he didn't review any of them. They claim that the meeting

1 minutes show that they meet the Central Hudson factors. But  
2 Daniels didn't review any of those minutes. What he did is he  
3 really just read the ordinances, and he testified about what  
4 they generally mean, and then he interpreted the ordinances.  
5 But statutory interpretation, that's the role of the Court.  
6 That's not the role of Dr. Daniels here. He's a land use  
7 planning expert from Pennsylvania. That's not his role here.

8 What he did, he talked to two members of PTP, Barb Wunsch  
9 and John Wunsch. He reviewed the Township's master plan, the  
10 recent master plan. I'll note that Exhibit G is the 2011  
11 master plan. That's the exhibit that the defendants put into  
12 evidence. That was actually from 2011, which is after these  
13 ordinances were enacted.

14 Very interesting thing on Dr. Daniels is the Township  
15 spent seven pages of their post-trial brief block quoting  
16 Daniels. He wasn't even their witness. But the bottom line  
17 of Daniels is he testified really what the ordinances  
18 prohibit, but he didn't testify that those prohibitions  
19 further a substantial governmental interest related to a harm  
20 that's actual and real. Really what he testified is he just  
21 would like these to be in place because it meets, you know,  
22 his favored way to preserve agriculture, which is a purchase  
23 development rights ordinance.

24 The next issue for trial was this issue of causation.  
25 Defendants had some pretrial concessions that are important on

1 this issue. One on the restriction of hours. Defendants  
2 concede that these winery ordinances do not contain any  
3 restriction on the tasting room hours for these wineries. The  
4 other is on the issue of weddings. That quote there, that's  
5 from Christina Deeran. She's the former zoning administrator.  
6 She testified that winery chateaus do not need approval from  
7 Peninsula Township to have weddings, to have family reunions,  
8 to have entertainment.

9 The farm processing section 6.7.2(19) (a), that's an  
10 intent provision of the ordinance. That's what Peninsula  
11 Township has been using for farm processing wineries to  
12 prohibit them from having social events for hire, weddings,  
13 wedding receptions, and restaurants. Now, in their pretrial  
14 brief, the defendants concede that intent provisions are not  
15 operative law. They testified, there's testimony that they  
16 were enforcing this intent provision as if it was operative  
17 law.

18 The same goes with the remote winery tasting room  
19 ordinance, which only applies to Peninsula Cellars. That  
20 ordinance, nowhere in there does it say that Peninsula Cellars  
21 or remote tasting rooms cannot have events, cannot have  
22 weddings, cannot have entertainment.

23 That section is silent, but Peninsula Township enforces  
24 that anyway. And the point of it is really Peninsula Township  
25 concedes that they're just sort of making it up. They're just

1           enforcing laws that are not actually on the books to serve,  
2           really, their wants.

3           Manigold and Deeran, their testimony, PTP argues that  
4           these admissions cannot be used against PTP because they  
5           weren't in the case yet when they were deposed. This issue  
6           came up at trial, your Honor may remember, regarding Greg  
7           Meihm, who is the Township attorney. We used his deposition  
8           transcript to lay the foundation, and PTP objected because  
9           they weren't there. And your Honor asked counsel for PTP, did  
10          you ask to redepose Mr. Meihm, and they answered yes. And  
11          then you overruled their objection. Same thing here. They  
12          could have redeposed Mr. Manigold. They could have redeposed  
13          Ms. Deeran. They chose not to. They made a strategic  
14          decision not to redepose these people and instead try to argue  
15          at trial that testimony can't be used against them.

16          Notably, defendants have a joint defense agreement. That  
17          joint defense agreement was in place before these depositions.  
18          Again, that testimony is unrebutted. They didn't have a  
19          witness on these issues on, you know, what -- how the Township  
20          enforced the ordinances and the Central Hudson factors.

21          The Township did enforce the ordinances. Peninsula  
22          Township officials, this is mostly Ms. Deeran, Mr. Manigold,  
23          and I think Mr. Hayward, they testified that they were either  
24          actively enforcing or would enforce each challenged section of  
25          the winery ordinances. That citation is to our post-trial

1 brief, and it's about five pages of a table showing all of the  
2 enforcement and all the testimony of their enforcement.

3 And this was despite Peninsula Township being advised by  
4 their own attorney that the ordinances were unconstitutional  
5 or preempted in several ways. That advice happened a year  
6 before we filed this lawsuit. I think it was August of 2019.  
7 He advised Peninsula Township that their ordinances were  
8 unconstitutional and/or preempted, and they continued to  
9 enforce them. I asked Supervisor Manigold at his deposition,  
10 why, and the testimony is, I know that sounds crazy, but  
11 that's the way it is out there. The way it is out there in  
12 Peninsula Township is they enforce restrictions and enforce  
13 ordinances that don't exist and that are unconstitutional, and  
14 they do it knowingly.

15 The wineries themselves presented evidence at trial of  
16 enforcement against them. Some examples, and I guess again  
17 cite to our brief, Bonobo couldn't have a painting event.  
18 Mari was told couldn't have weddings. Brys wanted to have a  
19 political fundraiser for Governor Whitmer's campaign, and  
20 Peninsula Township said they couldn't do it. Black Star,  
21 there was an event that Supervisor Manigold was a part of, and  
22 he threatened them, if you hold that event, quote, "I will  
23 find you and shut you down." For Two Lads, they were forced  
24 to cancel a barbecue and a summer solstice event. This goes  
25 back to that social event for hire issue. They were told they

1       couldn't have these because they were social events for hire.  
2       But that's an intent provision.

3           Peninsula Cellars, they got in trouble for having a guy  
4       with an acoustic guitar and bluetooth speaker. They also got  
5       a \$300 fine during COVID for having those little plastic  
6       igloos that keep people safe so you can eat outside. They got  
7       in trouble for that. They got a \$300 fine for that. Even  
8       Supervisor Manigold told John Kroupa, oh, this isn't right,  
9       you shouldn't have that. They appealed it, and the town board  
10      upheld the \$300 fine and told John Kroupa from Peninsula  
11      Cellars he was wrong for these igloos. I think he said he  
12      needed a permit, needed a building permit to have them. A  
13      land use permit, I believe.

14           Chateau Grand Traverse, you heard Eddie O'Keefe. He  
15      testified that he wanted to have a fundraiser for a beloved  
16      school teacher. She was dying of cancer. And the Township  
17      told him, if you have more than 75 people there, we'll know it  
18      and you're going to get a violation.

19           Bowers Harbor, we submitted I think three or four pages  
20      of a spreadsheet that Peninsula Township kept of all of the  
21      enforcement actions against Bowers Harbor. And at one point  
22      Spencer Stegenga was told if he had a certain event, they  
23      would put padlocks on his doors.

24           Chateau Chantal was told that it couldn't sell wine that  
25      it made from grapes it sourced from Argentina. This gets to

1 that Commerce Clause issue.

2 Tabone and Hawthorne, they're a little different because  
3 they're the newer wineries, but Bill Maier from Hawthorne, he  
4 testified that he also works at Bowers Harbor and he saw what  
5 Peninsula Township did to Bowers Harbor and how difficult they  
6 were on Bowers Harbor, and that is how he ran Hawthorne in  
7 response to that.

8 Mario Tabone, the newest winery out there, Tabone  
9 Vineyards, he testified that he saw what happened with Two  
10 Lads in social events for hire. He's also a farm processing  
11 winery, and so he acted accordingly with what the Township did  
12 to them.

13 The wineries presented evidence on the vagueness of the  
14 ordinances. Winery representatives provided evidence that  
15 they got lack of clarity. There was confusion of what these  
16 ordinances meant. They couldn't get clarity. Exhibit 43,  
17 this is an email that Todd Oosterhouse sent to Dave Sanger,  
18 Greg Meihn, and I believe it's Christina Deeren at the  
19 Township. And in that email he said, please define for me the  
20 terms guest activity, entertainment, and accessory use, and  
21 they wouldn't do it for him. He never got a response. He  
22 also asked in the email, he said, provide for me every time  
23 over the past three years Peninsula Township had defined or  
24 interpreted those three terms. They refused to give him a  
25 response.

1                   You also heard testimony from the winery representatives  
2                   that if they did get an interpretation or they did get a  
3                   definition from the Township throughout the years, that that  
4                   definition or interpretation would only last as long as that  
5                   official was in office. Because there was a revolving door of  
6                   planners. I think there was five planners I think was the  
7                   testimony. There were a number of zoning administrators.  
8                   Town board changed over time. Every time a new official came  
9                   in, they started all over again with a new interpretation.

10                  Supervisor Manigold, he testified that he thought the  
11                  winery ordinances were vague and we should throw out the whole  
12                  thing.

13                  We presented evidence that Peninsula Township enforced  
14                  the closing time on these wineries. Supervisor Manigold  
15                  testified that he believed that a 9:30 p.m. closing time was,  
16                  quote, "for everybody." If you read that portion of his  
17                  transcript the questions are, but this is only in the chateau  
18                  ordinance, but you're enforcing it against everybody. He  
19                  says, yes, this is for everybody. And the questioning is, but  
20                  this is only for guest activities. He says he thinks it's  
21                  implied for everything, for the tasting room, and, quote,  
22                  "That's what I'm enforcing." Yet he told Black Star that they  
23                  needed to close at 6 p.m. That was testimony from Lee Lutes.

24                  Again, the point of all of this is that Peninsula  
25                  Township is just making it up as they went along and changing

1 it as they saw fit.

2 You heard substantial evidence of the effect the  
3 vagueness of these ordinances had on these wineries. They  
4 said, we weren't able to know what we could and couldn't do.  
5 This is from Todd Oosterhouse. And the wineries didn't know  
6 what to plan for the next month or the next year, and that's  
7 really where this got them is because these wineries, you  
8 know, they need to be able to plan months or years in advance  
9 to know what they can and can't do. You know, they got to  
10 plan their wines. They got to plan, you know, additional  
11 planting. They have to plan if they can have an event or not  
12 an event. Weddings are usually, you know, those are planned  
13 or booked years in advance, but they couldn't do that sort of  
14 planning because they never knew what was allowed.

15 This really affected, that last bullet point, that's Mari  
16 Vineyard, Alex Lagina, he testified, I've gone back and forth  
17 reading the ordinance as to whether or not weddings are or are  
18 not allowed. He testified there was a point in time where he  
19 thought, yeah, you know what, weddings are allowed. He  
20 actually interpreted it like Christina Deeren did at her  
21 deposition, that weddings are allowed. And so he advised his  
22 staff to start booking some weddings, and they booked them.  
23 But then that changed. The Township came back and said, no,  
24 you can't have weddings. He had to cancel a wedding. I think  
25 he had to move a wedding to a different piece of property so

1           that he didn't, you know, ruin the bride's day. But that had  
2           a toll, you know, a large toll on these wineries.

3           Mario Tabone on this issue of tours, I know Mr. Rajsic  
4           asked a lot of questions of the wineries, said, well, of  
5           course you're allowed to have tours. Tours are an important  
6           part of your winery. But Mr. Tabone, he testified that he was  
7           fearful of having tours or promoting tours, because he didn't  
8           know if that would be considered an event and he'd get a  
9           violation.

10           All this led to the wineries suffering damages. So the  
11           wineries presented unrebutted evidence across five categories  
12           of damages. We had the expert testimony of Eric Larson, an  
13           accountant and business valuator out of Grand Rapids.  
14           Peninsula Township did not present its own damages expert. It  
15           made the strategic decision not to have its own expert.  
16           Instead it relied on attorney argument. But several courts  
17           have held that attorney argument is no substitute for  
18           evidence, especially when you are dealing with expert  
19           testimony. They didn't have any rebuttal witnesses to counter  
20           any of the winery evidence, any factual evidence on the  
21           damages they suffered.

22           Commerce Clause. So we presented documentary and  
23           testimonial evidence that they suffered damages for the  
24           Commerce Clause violation. This is the requirement that farm  
25           processing wineries use 85 percent grapes from Peninsula

1 Township, that winery chateaus can only serve 85 percent local  
2 fruit at their guest activities, and that a winery chateau is  
3 required to buy 1.25 tons of grapes from some farmer in  
4 Peninsula Township for every guest they'll have the following  
5 year. You held those unconstitutional in ECF 162 three years  
6 ago, I believe.

7 The farm processing wineries testified they were required  
8 to buy local fruit, and they did. They bought local fruit in  
9 order to qualify for guest activities. This is the chateaus.  
10 There's testimony there's not enough local fruit to serve  
11 their needs. There's testimony that Peninsula Township fruit  
12 was more expensive than other fruit.

13 Now, it's important to know that the Commerce Clause  
14 damages do relate to the guest activity damages because of the  
15 requirements to use local fruit at guest activities. It's not  
16 just the damages of the increased cost there because the  
17 wineries needed to buy that fruit. You know, Brys, Patrick  
18 Brys, he testified that they grow enough grapes on their  
19 property, I think they have 155 acres, that they didn't need  
20 to buy grapes from anybody else, and that they did buy grapes  
21 that actually would go to waste because they didn't have the  
22 ability to process that many grapes. But this meant they  
23 couldn't have guest activities because they couldn't qualify  
24 because they were forced unconstitutionally to buy grapes from  
25 somebody else. This was that Governor Whitmer event. He said

1           they couldn't have it, the Township said you couldn't have it  
2           because you haven't shown us your grape -- your tonnage  
3           report, so you bought grapes from somebody else. So that  
4           really sort of goes both ways where it's a Commerce Clause  
5           violation, which led to damages under the guest activities  
6           section.

7           Peninsula Township doesn't address the Commerce Clause  
8           damages in their brief whatsoever. I believe it's been  
9           conceded.

10           Damages for merchandise restrictions. This relates to  
11           four of the wineries, Tabone, Black Star, Two Lads, and  
12           Peninsula Cellars. You know, the Township alleges that these  
13           wineries were not harmed because they sold some merchandise,  
14           but that's the point. The point was they sold some. You  
15           heard testimony from Lee Lutes that Rob Manigold told them  
16           they could sell a few T-shirts or a few hats. They were told  
17           to keep it limited. Chris Baldyga, he testified that he  
18           wasn't able to have as much inventory as he might want to or  
19           have as nice stuff. You know, he wanted nicer, you know, I  
20           think it was zip-ups, nicer merchandise to sell to people, but  
21           he didn't buy that. He didn't invest in that inventory  
22           because he didn't know if he was actually allowed to sell that  
23           inventory. And those wineries testified they could have sold  
24           more if they could have done it more openly.

25           The wineries presented evidence, documentary and

1 testimonial, of damages from confusion at the vague  
2 ordinances. This evidence included customer requests for  
3 events, their capacity, the licensing that they had showing  
4 they could do these things. The average size of the events  
5 they wanted to have. The price they would charge. This  
6 evidence was based on, for someone like Black Star who has a  
7 winery in Suttons Bay, they use whatever pricing they have at  
8 that location to inform what they would charge in Peninsula  
9 Township.

10 Some of the wineries testified they went around and  
11 looked, say, what the Jolly Pumpkin, a local brewery that's  
12 allowed to have events, what they charge, or the Boathouse,  
13 local restaurant, what they charge. Some of them testified  
14 that they leaned on what they charge for the few events  
15 they're allowed to have. All that evidence was here.

16 We had hundreds and hundreds of pages of customer  
17 requests. Exhibit 131, that's an exhibit from an Excel  
18 spreadsheet from Chateau Chantal. It had 722 event inquiries  
19 between 2018 and 2020. Exhibit 170 is 161 pages of event  
20 inquiries for Mari. The testimony is that these were only a  
21 fraction of the requests and inquiries that these wineries  
22 get.

23 Patrick Brys testified that they were getting so many  
24 requests they eventually put a page on their website to stop  
25 people requesting, and they put a sign in their tasting room

1 to stop people from requesting having events and activities  
2 there.

3 The Township didn't offer any rebuttal evidence to this.  
4 There is no rebuttal. Instead what the Township asked these  
5 witnesses were, well, you didn't do a feasibility study, did  
6 you? You had no feasibility study. I remember he asked --  
7 Mr. Rajsic asked Chris Baldyga about his feasibility study,  
8 what would you do if there was inclement weather? And  
9 Mr. Baldyga responded, I don't know because I haven't had the  
10 chance to look into that. I don't have any contracts for  
11 this. I've never been allowed to do it. And Mr. Rajsic  
12 pressed him on that, and eventually your Honor put a stop to  
13 it. You said, I think the bottom line of the witness's  
14 testimony is he wants the ability to do it. Make a business  
15 decision as to whether he wants to or not.

16 That's exactly it. These wineries want to be able to  
17 make a business decision of how they run their businesses, run  
18 wineries without the Township interfering in that.

19 The wineries presented evidence of damages for guest  
20 activities and prior restraint. The Township claims that some  
21 of these wineries cannot recover damages because the Court  
22 declared that these ordinances had not been applied to them  
23 for their as-applied challenge, but in that same opinion you  
24 said it doesn't apply to the facial challenge. You've already  
25 ruled these ordinances are facially unconstitutional, being

1 vague and being a prior restraint, so the wineries are  
2 entitled to damages for that.

3           But we also put in evidence substantial evidence at trial  
4           that these ordinances were enforced against these wineries.  
5           You had the testimony from Manigold and Deeren that said they  
6           were enforcing these ordinances against the wineries. You had  
7           confusion by the Township in emails about what was and was not  
8           allowed to occur. You had denial of events for not being  
9           agriculturally related. You had denial of events because they  
10           didn't qualify for guest activities because they didn't buy  
11           enough grapes. That's just the Commerce Clause problem  
12           working its way into a First Amendment problem.

13           Brys couldn't have Governor Whitmer have a fundraiser  
14 because they didn't buy enough grapes. That's just the  
15 Commerce Clause problem.

16 You had a multipage spreadsheet related to Bowers Harbor  
17 showing three or four pages of enforcement action against  
18 Bowers Harbor preventing it from doing certain things and  
19 threatening to padlock its doors. All that testimony was  
20 unrebutted.

21           The wineries presented evidence of the closing time  
22           damages, so each winery testified, again documentary and  
23           testimonial, of their preferred closing time, their typical  
24           evening sales hours. Each winery witness testified that this  
25           information was accurate.

1 THE COURT: I did not hear a lot of testimony that  
2 some of the wineries even contemplated going beyond 9:30.

3 MR. INFANTE: I think they said their preferred  
4 closing time would be 11. I think the testimony you're  
5 referring to is the question of why didn't you stay open late,  
6 later than 9:30, and the wineries testified that that was a  
7 shift problem for them. Because they had -- it would have  
8 been a split shift. They would have had to do a shift and a  
9 half. Typically they opened at 11 a.m. or noon, and so  
10 staying open until 6 or 7 p.m. was one whole shift. But if  
11 they were going to stay open until 11:00 p.m., or 9:30 p.m.,  
12 sorry, 9:30 p.m., that would be a half a shift, and they  
13 couldn't get employees to come out on the peninsula for half a  
14 shift. They couldn't staff it. That's the testimony you  
15 heard. But the testimony also was, if we could stay open  
16 until 11, our preferred closing time, we could have done two I  
17 think it's six-and-a-half or seven-hour shifts. They could  
18 have done two full shifts when you have the opening and  
19 closing hour on each end of that. That was the unrebutted  
20 testimony from each of these wineries is that staying open  
21 until 11, we would have had two shifts.

22 Again, the Township challenges this, again, but not by  
23 expert testimony. They didn't hire an expert. Instead they  
24 rely on attorney argument.

25 THE COURT: Am I right that most of the discussion

1                   in the complaint as it related to closing time addressed only  
2                   the preemption issue?

3                   MR. INFANTE: You are correct that we did address  
4                   it, closing time, in preemption, but we addressed vagueness in  
5                   our complaint, the vagueness of the ordinance. If you want to  
6                   talk about whether or not, you know, this idea of enforcing a  
7                   vague ordinance or an ordinance that doesn't exist, whether  
8                   that was addressed early on in this case, I think this is that  
9                   Sanderson case we discussed and the Chalmers case.

10                  THE COURT: Well, the first time I heard anything  
11                  about Sanderson was the post-trial briefs, correct?

12                  MR. INFANTE: It was at trial, Your Honor.

13                  THE COURT: Okay.

14                  MR. INFANTE: Correct. But in ECF 136, we cited for  
15                  your Honor Chalmers v. City of Los Angeles. Chalmers v. City  
16                  of Los Angeles is a Ninth Circuit case. That case stands for  
17                  the proposition that when a local unit of government enforces  
18                  an ordinance that does not exist, a restriction on an  
19                  individual's occupation, that violates their liberty interest  
20                  in their chosen occupation, and lost profits are a measure of  
21                  damages for them. That's a Ninth Circuit case that we filed  
22                  with this Court early on. That was January of 2021? 2020?

23                  Sanderson is the exact same proposition. I cited to  
24                  Sanderson at trial to the Court on that issue because  
25                  Sanderson is a Sixth Circuit case. Is a Sixth Circuit --

1 THE COURT: Which is closer to home, obviously.

2 MR. INFANTE: That's why I brought it up at trial,  
3 it's closer to home, correct, but it's the exact same  
4 proposition, that with a business having an ordinance that  
5 doesn't exist and forced upon it, and the Court said it could  
6 get lost profits for that. I'll note those two cases are  
7 cited together, Sanderson and Chalmers. Judge Quist in Horn  
8 v. City of Mackinaw Island, which is a 2013 case, he cited  
9 both Sanderson and Chalmers for this same proposition. But we  
10 have cited that case -- that proposition long ago. It's no  
11 surprise that, you know, the issue of closing time -- there's  
12 no surprise at trial that the issue of closing time and  
13 damages were in this case. You even said, your Honor, at  
14 trial when counsel was objecting on that issue, you said,  
15 counsel, the issue of closing time and the vague ordinance has  
16 been in this case since the beginning, and you ordered him to  
17 move on.

18 Also I'll note, and counsel helped me out here, we  
19 discussed preemption in our brief because that was when the  
20 Township was arguing that closing time was actually  
21 enforceable, that it actually -- the ordinances included a  
22 closing time on all tasting rooms, activities of the wineries.  
23 I think in Mr. Meihn's memorandum he even addresses that, that  
24 it's not preemptive, because that ordinance is enforceable.  
25 That flipped during the case.

1           We have the testimony from Mr. Manigold. We actually had  
2 Mr. Meihn at the hearing on the motion for summary judgment.  
3 During that hearing, ECF 155 or so, during that hearing he  
4 said, these ordinances do not contain a closing time. The  
5 wineries' tasting rooms can stay open. They didn't make that  
6 explicit statement until the hearing on the motion for summary  
7 judgment, which was April of 2021, I believe. And then in  
8 pretrial briefing, PTP, in their joint brief, now said, you're  
9 right, these ordinances do not contain a closing time, so  
10 we're enforcing an ordinance that doesn't exist.

11           Now, if they had said before we filed our complaint, if I  
12 had evidence from Peninsula Township that they agreed these  
13 ordinances did not contain a closing time, then I probably  
14 would have pled it that way in the complaint. But they were  
15 enforcing it, so we put it as a preemption clause.

16           The damages, this is that Sanderson case, I had the cite  
17 right there, Horn v. City of Mackinaw Island, that's a Judge  
18 Quist case.

19           We presented Eric Larson unrebutted at trial. I don't  
20 intend to walk through his testimony. I just want to address  
21 some of the challenges that Peninsula Township makes to his  
22 testimony. One is on this issue of net profits. They  
23 challenge that he should have used net profit instead of gross  
24 profit. The Township's just wrong on that case, or on that  
25 issue. The cases they cite are cases with new businesses,

1 like start-up businesses. And for start-up businesses, those  
2 cases say that you should use net profits. But Eric Larson  
3 testified that these are not startups. The winery  
4 representatives testified that they're not startups. These  
5 are established businesses. Chateau Grand Traverse has been  
6 around for about 50 years. They're established. They  
7 testified that they don't -- there's no investment they need  
8 to make. He testified that using net profit, that includes  
9 operating expenses, cost of land, chemicals, netting, property  
10 taxes, things that have already been taken account of.

11 What Larson testified was these activities, the things  
12 the wineries want to do, these elements of damages are  
13 ancillary to that. Ancillary to those fixed costs. So I'm  
14 really looking at understanding is it incremental profit and  
15 incremental cost, so profit and variable cost. That's why he  
16 testified that net profits was the wrong calculation, because  
17 there were no increased incremental costs. Peninsula Township  
18 does not have an expert witness to say that net profit is the  
19 right number to use. They just have attorney argument. But  
20 Mr. Rajsic and Mr. McGraw, they're not expert witnesses on  
21 that. Mr. Larson is an expert witness on that.

22 There's two cases we cited for the Court that have found,  
23 two Sixth Circuit cases, that when an expert testifies that  
24 there are no incremental costs or no new overhead costs that  
25 using net profits is incorrect; using gross profit is correct.

1 Peninsula Township challenges, you know, sort of what  
2 Mr. Larson did, his methodology. One thing they challenged is  
3 that they say he should have personally gone and obtained  
4 records from these wineries. You know, that issue came up  
5 early on in the case in a motion in limine I know Judge Kent  
6 ruled on. There's no obligation of an expert to physically go  
7 and obtain records. It's perfectly appropriate for an expert  
8 to rely on either a party or counsel to provide records, to  
9 provide evidence.

10 What he did, he created a framework. He testified that  
11 he's the one who came up with the framework of damages and the  
12 categories of damages. He created a matrix, a table that  
13 would be used to bring all that information together for each  
14 winery. He participated in a pre-opinion video call with each  
15 winery. He reviewed their business records, sales reports,  
16 purchase reports. He asked follow-up questions to verify the  
17 information was accurate. He relied on industry data, like  
18 the RMA, Risk Management Association. He relied on his  
19 accumulated skill, knowledge, training, experience, and  
20 professional judgment. And he also attended every single day  
21 of trial, and he listened to the trial testimony of these  
22 winery representatives and then after that he testified.

23 What you didn't hear, you didn't hear a rebuttal expert.  
24 You didn't hear anyone from the Township saying that  
25 Mr. Larson should have done something differently. Again, we

1 just have attorney argument.

2 On this RMA data, Peninsula Township challenges that he  
3 shouldn't have relied on the data from the RMA, but courts  
4 routinely find it to be reliable, reasonable, appropriate,  
5 routinely admitted. Peninsula Township points out that the  
6 RMA data has these caveats in them. This Dietz case, the  
7 Court addressed these caveats specifically, and the Court said  
8 those caveats are immaterial, that the RMA data is one of the  
9 preeminent authorities on this issue, and it's been around I  
10 think at the time of this case it was 85 or 88 years it had  
11 been around.

12 They allege that Mr. Larson made some errors.  
13 Interesting, in their post-trial brief they discuss this issue  
14 that he created a supplemental report, as if that's an error  
15 in his opinion. Your Honor addressed that in ECF 284. They  
16 had objected originally. They filed a motion in limine on  
17 that report, and your Honor said it was appropriate for him to  
18 do it and that he actually had a duty to do a supplemental  
19 report due to some errors that were found during his  
20 deposition. I think there was an Excel spreadsheet  
21 calculation error, and he didn't account for COVID closure  
22 restrictions. So he made a supplemental report. It was  
23 perfectly appropriate.

24 At trial there were -- I believe there were three issues  
25 that came up at trial. Alex Lagina testified that the sales,

1 hourly sales number for Villa Mari was accidentally doubled  
2 when they got pulled. Mario Tabone and Lee Lutes testified  
3 that the merchandise sales numbers that were provided to  
4 Mr. Larson was inaccurate, and they testified to a higher  
5 number, meaning less damages. Again, with Mr. Lagina, meaning  
6 less damages. It reduced the amount of the damages. And Bill  
7 Maier testified that historically Hawthorne was closed in the  
8 winter, not anymore but historically, so that damage number  
9 was reduced as well.

10 But Mr. Larson was sitting here throughout trial. He  
11 heard that testimony, and when it was his turn to testify, he  
12 accounted for that, and he reduced his damage number. It was  
13 appropriate for him to do that, and I believe he had a duty to  
14 do it.

15 Peninsula Township challenges that not all these wineries  
16 are open 365 days a year and Mr. Larson's calculation was 365  
17 days a year. I'm not sure all of them are closed -- I believe  
18 Chateau Chantal, Ms. Dalese testified that they're open every  
19 single day. But even if they are, I think the Township says  
20 on average these wineries are closed five days a week (sic).  
21 I did the math. That's a 1 percent differential. Almost  
22 inconsequential. I'm sorry, a year, not a week.

23 Mr. Larson at trial, because we don't know the date of a  
24 judgment in this case, we don't know the date this is going to  
25 end, the damages continue, his testimony he provided a yearly

1 damage number for each winery. In our post-trial briefing, we  
2 brought that yearly number to date and did a per diem for the  
3 Court to calculate it. I ran that number until today's date.  
4 So three years prior to the date of filing the lawsuit until  
5 today's date almost lines up exactly. Exactly seven years.  
6 These are the damages for each individual winery, plus  
7 attorney's fees, costs, and interest. We'd ask the Court to  
8 award attorney's fees, a petition we would file at a later  
9 date.

10 Also asking for injunctive relief. Asking the Court to  
11 enjoin the enforcement of sections it's deemed  
12 unconstitutional or preempted. Your Honor has already  
13 declared in your summary judgment opinions you would enjoin  
14 the enforcement of these ordinances going forward, any that  
15 you found unconstitutional. We think that should include any  
16 restrictions in the SUP, any other restrictions Peninsula  
17 Township might put in place, and we ask that the Court declare  
18 the wineries' proposed uses are reasonable. This is given the  
19 MLCC and MDARD permissions these have and also the testimony  
20 from the wineries.

21           And the wineries testified what is normal at wineries in  
22           the state of Michigan. You had the wineries from Black Star,  
23           the owners from Black Star, testify about what they do at  
24           Suttons Bay, the sorts of activities they have there. We'd  
25           ask the Court to declare things like serving food and

1 catering, promotional activities, educational activities,  
2 large and small events, amplified music, selling merchandise,  
3 making wine from grapes from any source they wish, it's the  
4 Commerce Clause issue. Selling wine to customers how they  
5 want to sell their wine. How they want to market and how they  
6 want to advertise and sell their wine.

7           This is allowed under Michigan law. It's the Schwartz v.  
8        City of Flint case. In that case, the Michigan Supreme Court  
9        has declared that when a court finds an ordinance to be  
10       unconstitutional, the court can declare that use is reasonable  
11       so long as there has been evidence. We put that evidence in  
12       at trial, and that evidence is unrebutted.

13           Really you can look at the GAAMPs. The farm market  
14           GAAMPs. It's unrebutted in this case that each of these  
15           wineries is a farm market under the Michigan Right to Farm  
16           Act. Because they're a farm market, they cannot be held --  
17           they cannot be found to be a public or private nuisance as  
18           long as they conform to the GAAMPs. And we put the GAAMPs  
19           before you. Gary McDowell testified as to what the GAAMPs  
20           allow these wineries to do. A local unit of government cannot  
21           enact, maintain, enforce an ordinance or regulation that  
22           conflicts with the Right to Farm Act or the GAAMPs. This is  
23           also why what the wineries want to do is reasonable.

24 I want to address PTP's argument on injunctive relief.  
25 So PTP confuses a principal use and accessory use. Wineries

1 are a principal use in Peninsula Township. As a principal  
2 use, they're allowed accessory uses which are, quote,  
3 "Customarily incidental and subordinate to the principal use."  
4 So this is that unrebutted testimony that we provided.  
5 Customer uses that wineries -- you can look at what Black Star  
6 does in Suttons Bay, what Gary McDowell testified that the  
7 Michigan GAAMPs allow, they allow events and other value-added  
8 agriculture. Even Dr. Daniels concedes that the Township's  
9 master plan contemplates agritourism, and he concedes that in  
10 Michigan farm weddings are a form of agritourism.

11 The winery ordinances also recognize that music, food,  
12 events, and other accessory uses are allowed at wineries.  
13 They just try to restrict it in an unconstitutional manner.  
14 For example, a 501(c) (3) can have an event at a winery in  
15 Peninsula Township. So an event must be allowed. But a  
16 non-501(c) (3) cannot have an event.

17 Some events are allowed at Peninsula Township. They just  
18 want to restrict in an unconstitutional manner. Same with a  
19 agriculturally related group. Some are allowed; some are not.  
20 They're just restricting in an unconstitutional manner.

21 On McDowell, I need to address this. So PTP argues that  
22 you should reject his testimony because it was based on his  
23 hay farming experience in three years directing a state  
24 development agency. Gary McDowell was the executive director  
25 of Michigan Department of Agriculture and Rural Development.

1           That's a cabinet-level position. He has more real-world  
2           experience preserving agriculture in Michigan than Dr. Daniels  
3           does, a professor from Pennsylvania.

4           Speaking of Dr. Daniels, he just simply wasn't credible.  
5           Courts routinely reject expert testimony when the expert  
6           cherry picks what evidence they're going to rely upon. Here  
7           he testified he cherry picked. Actually he testified that  
8           counsel for PTP cherry picked what he relied upon. He did not  
9           review Liquor Control Code. He didn't review the Right to  
10          Farm Act. He didn't review the Michigan GAAMPs. His  
11          testimony actually on the GAAMPs was he didn't even know what  
12          they were until we asked about it at his deposition.

13          He didn't review the Code of Federal Regulations, aside  
14          from the section on AVAs. He didn't review the Bob Manigold  
15          deposition, the Christina Deeren deposition, any winery  
16          deposition, any Township witness deposition. And, again, he  
17          didn't review any of the board -- town board or planning  
18          commission meeting minutes, which Peninsula Township says is  
19          the most important evidence in this case.

20          He also wasn't credible because, you know, his testimony,  
21          he testified that Peninsula Township has an interest in  
22          keeping land values low. Now, that wasn't an interest that  
23          Peninsula Township put forth in this case. He testified this  
24          would allow Peninsula Township to buy development rights from  
25          local farmers at a lower price and that this was somehow a

1 good thing.

2 Now, Gary McDowell, he was incensed by this. He  
3 testified that a farmer's land value, that's their retirement  
4 fund. That has their ability -- their ability to borrow money  
5 from banks to invest in agriculture, to invest in equipment,  
6 to invest in more farmland. That's dependent on the value of  
7 their farm land being high. But, remember, this was PTP's  
8 witness, and PTP represented to the Sixth Circuit that they  
9 need to be let in this case because their members feared that  
10 their land values would go down. But yet it brought an expert  
11 here to testify that the land values should go down, and if  
12 land values go up, that's a bad thing.

13 So why is PTP in this case? Their participation in this  
14 case really ended up being just a sham. This Court in ECF 301  
15 said that PTP could participate only on those claims that  
16 affect its members' land value, quiet enjoyment of their  
17 property, and the viability of their farms. But then they  
18 didn't have a single member sit in that chair and testify that  
19 their land values would go up or down, I'm not sure anymore,  
20 that their quiet enjoyment would be affected if these winery  
21 ordinances were struck down, or that the viability of their  
22 farms would be affected by these ordinances.

23 I mean, there's no evidence before this Court that any  
24 member of PTP is even a farmer because no one sat in that  
25 chair and told you about their farm. No one sat in that chair

1 and told you about how, you know, their ability to sit on  
2 their deck and enjoy an evening will be affected if these  
3 winery ordinances were struck down. That evidence does not  
4 exist in this record. They alleged it. They alleged it in  
5 their motion to intervene to you. They alleged it in their  
6 appellate brief to the Sixth Circuit. But they couldn't prove  
7 it at trial. They didn't show up to prove it. And cases we  
8 cited, Eastern District of Michigan case, the Coalition to  
9 Defend Affirmative Action case, that case says that when an  
10 intervenor has been allowed in by right and no longer meets  
11 the requirements for intervention, it's proper for a court to  
12 dismiss that intervenor. PTP no longer meets the  
13 qualifications for intervention because they couldn't prove it  
14 at trial, and they should be dismissed.

15 The winery witnesses also discredited Dr. Daniels. We  
16 had Teri Quimby. She testified the Liquor Control Code forms  
17 the backbone of Michigan's alcohol policy and that it was  
18 wrong for Dr. Daniels not to review it. He testified that his  
19 alcohol opinions are contrary to Michigan's interest in  
20 promoting health, safety, and welfare. For example,  
21 Michigan's alcohol policies that food should be served with  
22 alcohol. Dr. Daniels testified that these wineries shouldn't  
23 serve food at all, or if they do, it should be severely  
24 limited. She testified the Liquor Control Code allows the  
25 wineries to operate restaurants at their tasting rooms.

1 Dr. Daniels testified that these wineries shouldn't operate  
2 restaurants. That's because he didn't read the Liquor Control  
3 Code to see it's allowed.

4 McDowell, right, he testified that the Right to Farm Act  
5 and the GAAMPs protect farmers, protect agriculture, and allow  
6 for value-added agriculture. He testified that Daniels'  
7 testimony was, quote, "Totally unrealistic. Just no way they  
8 would apply in today's farming with the challenges and the  
9 struggles that our farmers are facing. Everything goes back  
10 to that profitability. To save our farmland, we need to make  
11 sure our farmers are successful."

12 His opinions were contrary to Michigan law. He testified  
13 that the amount of the wine that these wineries should  
14 produce -- can produce, should be limited. Teri Quimby  
15 testified the Liquor Control Code allows unlimited amounts of  
16 wine. He testified the commercial activity at wineries should  
17 be restricted, but he conceded the wineries are allowed to  
18 sell agriculture products, which is commercial.

19 Quimby and McDowell both testified that his opinions are  
20 contrary to Michigan policy and the Liquor Control Code and  
21 the GAAMPs.

22 He testified Wineries shouldn't sell water. Teri Quimby  
23 testified MCL 436.1537(7) allows wineries to sell water. That  
24 came about because of Eddie O'Keefe. He testified he had an  
25 issue with Peninsula Township, they wouldn't let him sell

1 water, and he found it easier to go to the state legislature,  
2 get a bill drafted, get it passed, and it passed unanimously  
3 in only a couple of months.

4 Daniels testified that these ordinances are necessary to  
5 prevent the wineries becoming bars and wine shops. Teri  
6 Quimby testified with the three-tier system and different  
7 licensing categories, the prohibition of holding licenses in  
8 different categories, the wineries could not possibly become  
9 that. Could not possibly become bars and wine shops. We  
10 asked Daniels about that, and his testimony was, I don't even  
11 know what the three-tier system is.

12 He testified that wine tasting should occur indoors.  
13 Again, Teri Quimby testified that Michigan law allows tasting  
14 outdoors. He testified that marketing activities and weddings  
15 should not occur at farms. In response, McDowell said, it  
16 must be another state that Daniels was talking about, but he  
17 wasn't talking about Michigan. He testified that GAAMPs allow  
18 farm weddings and this preserves agriculture.

19 He also testified, Daniels, without any factual support,  
20 he said Township restaurants need protection from the wineries  
21 selling food. He didn't know there was only three restaurants  
22 in all of Peninsula Township. He opined that weddings add  
23 more cars to the road, but that's not the issue. The issue  
24 is, and the question is, how many more cars can Peninsula  
25 Township roads handle? He didn't testify to that, because he

1       conceded he's not a traffic expert. There's no traffic study  
2       in evidence before this Court that says, you know, one more  
3       car, the township roads can't handle that. There's no  
4       evidence there, and they need that evidence.

5           He opined that on-farm marketing activities do not  
6       preserve agriculture. McDowell testified that these  
7       activities give the farmer an opportunity to market his  
8       product or increase the profitability of that farm operation,  
9       that's how we are going to keep our land in farming. Again,  
10       Gary McDowell, former executive director of MDARD, has more  
11       real-world experience preserving agriculture in Michigan than  
12       Dr. Daniels.

13           That's really the bottom line. You know, these wineries  
14       are preserving agriculture. They have 1,650 acres of land out  
15       there made up by these wineries, and they want to keep that.  
16       They want to protect that. They testified that they're the  
17       ones doing the protecting, but in order to do that, they need  
18       value-added agriculture. It's Peninsula Township and PTP that  
19       are standing in their way.

20           Todd Oosterhouse testified that there's 82 acres next to  
21       his winery at Bonobo, and he would like to buy those 82 acres  
22       and plant those 82 acres, more grapevines, but he can't do it.  
23       He won't invest that money with these winery ordinances in  
24       place because he doesn't have a place to sell the wine. He  
25       doesn't have a place to sell those grapes. These

1 unconstitutional ordinances are standing in the way.

2 This Court recognizes the wineries want to make a  
3 business decision what's best for them. They need to be  
4 allowed to make that business decision. The Court should  
5 invalidate the remainder of the winery ordinances, issue an  
6 injunction precluding their enforcement, and the SUPs, and any  
7 similar restrictions.

8 We have here -- I know the Court's aware of Amendment  
9 201. You have another case in front of you on Amendment 201.  
10 Everything that the Township has done shows us that unless  
11 they're enjoined from not just these ordinances but any  
12 similar ordinances, they're going to put it back in place.

13 Amendment 201 has a restriction in grapes sources, just  
14 like this Court already struck down. It has other  
15 restrictions that this has Court already struck down. If you  
16 don't enjoin them from any similar restrictions, they're just  
17 going to put them back in place, and we're going to be right  
18 here again in a year from now or two years from now right back  
19 before this Court.

20 This Court should award the wineries substantial damages  
21 as well as their attorney's fees. We think substantial  
22 damages are necessary in this case and appropriate in this  
23 case really given their conduct.

24 You know, Peninsula Township had a chance to avoid the  
25 lawsuit when its attorney told them their ordinances were

1 unconstitutional and preempted and that they needed to change  
2 them. They worked with the wineries for a year. They said  
3 they were going to work with the wineries for a year to revise  
4 the ordinances, and at the end they said, no, we're not going  
5 to change them and went and tried to make the ordinances more  
6 restrictive. If they had followed their lawyers' advice, they  
7 could have avoided this lawsuit, and they could have avoided  
8 damages. Damaging the wineries for five more years. But they  
9 continued to enforce them, and that's because according to  
10 Supervisor Manigold, that's just the way it is in Peninsula  
11 Township.

12 Unless your Honor has any questions?

13 THE COURT: I do not at this point. Thank you.

14 MR. INFANTE: Thank you, Judge.

15 THE COURT: Mr. Rajsic, before we begin we'll take  
16 ten minutes, and I'll come back at ten to 11.

17 (Recess from 10:41 a.m. to 10:54 a.m.)

18 THE COURT: We are back on the record in 20-1008.  
19 All counsel are present. Mr. Rajsic on behalf of the  
20 Township, go ahead, sir.

21 MR. RAJSIC: Thank you, Your Honor. And good  
22 morning again. Bo Rajsic on behalf of Peninsula Township.

23 I have to say, your Honor, it's been a pleasure to stand  
24 before the Court and represent Peninsula Township in this case  
25 and its interests. Again, I have to say, too, it's been an

1 adventure. Getting this case prepared and then through trial.

2 Two weeks of trial. A tornado that we survived. There was a  
3 gas leak in the courthouse. What an adventure we've been on.

4 Your Honor, at base, this case involves attention between  
5 competing interests. The Township has a long, documented  
6 history of and substantial interest in protecting agriculture  
7 and its rural character, and rightfully so.

8 Old Mission Peninsula and agriculture go hand in hand and  
9 go back well over a century. Agriculture has played a vital  
10 role and allies the Township residents from then until now,  
11 and this will hopefully continue into the future.

12 As I mentioned, this history of agriculture on Peninsula  
13 Township goes back well over a century. As noted in the  
14 master plan, which is an exhibit that was admitted at trial,  
15 the 1904 census shows that more than 1,500 acres in 1904 had  
16 been placed into apple orchards and cherry orchards. Again,  
17 more than 120 years ago at this point in time. This has led  
18 to a significant portion of the land in Peninsula Township  
19 being zoned agricultural and being placed into agricultural  
20 production over the years.

21 On the other side, of course, there are competing  
22 interests to the agricultural and rural components, and it's  
23 not surprising given the beauty and location of Old Mission  
24 Peninsula. Opposite of agricultural uses we have in this  
25 instance commercial interests and proposed commercial uses.

1                   Commercial uses without any sort of nexus to agriculture  
2 are inconsistent with those agricultural uses. But over the  
3 years and through the efforts to amend the zoning ordinance  
4 back to the '80s, the Township has worked to strike a balance.  
5 Those efforts to strike a balance take center stage in this  
6 litigation.

7           Part of the efforts to strike a balance between  
8        agricultural and commercial uses has been over the years to  
9        attempt to foster a thriving local wine industry, working with  
10       them in this case, all while attempting to preserve the  
11       Township's rural and agricultural nature.

12 I think through trial we looked at a lot of beautiful  
13 photographs, showing a few of them here today. The grape  
14 growing, wine making, those both have obvious ties to  
15 agriculture. The nexus is clear. But from there become  
16 expanded uses that step further and further away from  
17 agriculture. Where and how should the Township draw the line?  
18 How did the Township work in this case and over the years to  
19 achieve a balance between those agriculture uses and the  
20 commercial uses?

21           Here, as we demonstrated at trial, the Township worked to  
22           achieve that balance through a deliberative legislative  
23           process. There's a framework for this process. It's not  
24           grasped out of thin air. At trial, the Township laid out this  
25           history in the only logical and appropriate way, by

1 introducing its legislative record in history, and the  
2 framework for this is critical.

3 The Township master plan forms the foundation upon which  
4 all zoning decisions are made. The master plan is a vision,  
5 and that vision is intended to guide the private sector and  
6 local government in determining the best use for future  
7 development, growth, and land preservation efforts in the  
8 township.

9 Under Michigan law, the existence of the master plan and  
10 the future land use map are generally sufficient to show  
11 governmental interests, not that governmental interests were  
12 even in dispute in this case given the Court's summary  
13 judgment ruling.

14 From the master plan, the Township, through a  
15 deliberative legislative process, in which the public,  
16 including the wineries, participated, arrived at land uses  
17 that advance the Township's interest in promoting agriculture  
18 production while maintaining a rural character, but also  
19 working to ensure that new land uses were compatible with the  
20 master plan.

21 It's a delicate balance that has worked through a process  
22 where you start at the planning commission, work to amend an  
23 ordinance, go through a township board. It's a deliberative  
24 process that takes significant time to achieve.

25 The record at trial demonstrates the Township worked

1 to strike that balance between fostering a vibrant wine  
2 industry while attempting to preserve the Township's  
3 character. As the Township has consistently argued, it speaks  
4 through its minutes, it speaks through its ordinances, and it  
5 speaks through its resolutions. In other words, the board  
6 operates as a whole, not as individuals, and not through the  
7 testimony of individual board members. In this case, the  
8 Township presented a substantial --

9 THE COURT: I didn't hear from any board member, did  
10 I?

11 MR. RAJSIC: At trial, no, your Honor, you did not.  
12 And the Township submitted --

13 THE COURT: Is there a reason for that?

14 MR. RAJSIC: There was a conscious choice made given  
15 the fact that as we have been consistently arguing throughout  
16 this case, the Township speaks through its minutes. It speaks  
17 through its resolutions. It doesn't speak through board  
18 member testimony because individual board members can't bind  
19 the Township. The Township speaks through its legislative  
20 history. In this case, that legislative history was submitted  
21 at trial in the form of voluminous planning commission  
22 meetings, township board meeting minutes, and Zoning Board of  
23 Appeals minutes stretching back nearly 40 years of history.

24 These meeting minutes show the history of how the  
25 Township arrived at the challenged zoning provisions, the

1 alternatives that were considered and rejected over the years,  
2 and the history of plaintiffs' involvement in those proposed  
3 land uses, along with the record of their own land use  
4 permits.

5 Plaintiffs demonstrate, excuse me, the records  
6 demonstrate that in two of the three instances, challenged  
7 laid uses, the winery chateau and the remote wine tasting  
8 room, were requested by the plaintiffs and arrived at  
9 following a deliberative process laid out in the legislative  
10 record.

11 As we see on the screen, we go back to May 1, 1989. At  
12 the May 1, 1989, planning commission meeting, Bob Begin, the  
13 founder of Chateau Chantal, approached the Township to request  
14 a consideration of an amendment to establish the winery  
15 chateau use in Peninsula Township. And similarly in 1998,  
16 Peninsula Cellars, the only remote wine tasting room,  
17 approached the Township to also request a use that would allow  
18 them to have a tasting room that was separate from their  
19 farming operation.

20 From 1989 to 2004, the Township amended its zoning  
21 ordinance to create land uses and opportunities that allowed  
22 the wineries to engage in commercial uses that had a nexus to  
23 agricultural purposes, commercial uses that would otherwise  
24 not be permitted in the A-1 agriculture district without some  
25 sort of amendment to the zoning ordinance.

1           These land uses allow for nearly limitless ability to  
2 sell wine at retail, to draw customers in for experiences on  
3 the land, and the record at trial demonstrates that these  
4 customers, these visitors, number in the thousands on a daily  
5 basis.

6           At trial the proofs demonstrated, among other things,  
7 that plaintiffs can and do engage in all the following: They  
8 offer tastings, flights, and wine by the glass, and bottles  
9 for purchase for individuals and groups in their tasting rooms  
10 where the wineries can and do promote their products, wine  
11 clubs, and the beautiful views that they have on Old Mission  
12 Peninsula. They offer tours through their vineyards and their  
13 production facilities, which are built-in opportunities to  
14 promote their products. They host promotional activities,  
15 such as Jazz at Sunset, Wind Down Wednesday, book clubs,  
16 trivia nights, painting, yoga, and even snowshoeing. They  
17 host groups of people in their tasting rooms, such as alumni  
18 groups, corporate groups, or perhaps most terrifyingly as we  
19 established at trial, groups of lawyers that may wander  
20 through the township. They operate bed and breakfast  
21 facilities that can be used to host weddings, corporate  
22 retreats, and breakfast facilities, as long as they have  
23 overnight guests.

24           As we look at the screen here, Chateau Chantal offers  
25 corporate meetings and small groups as part of their

1 advertising. Again, this was admitted at trial.

2 Additionally, Bonobo, for example, there was a document  
3 with dozens upon dozens of event contracts that was submitted  
4 in evidence at trial showing that they do offer group tastings  
5 and other events on their property.

6 Additionally, the evidence established at trial shows  
7 that the wineries sell branded merchandise, such as T-shirts,  
8 hats, mugs, stemware, and more that allows for additional  
9 revenue streams and self-promotion.

10 Here we have a photograph from Tabone where we see they  
11 do indeed sell merchandise in their tasting room. And this is  
12 not something that's hidden or kept under wraps. It's  
13 actively promoted in the tasting room.

14 Similarly for Peninsula Cellars, they sell T-shirts and  
15 other goods in the tasting room that's not hidden and open to  
16 the public for consumption.

17 After decades of effort to craft a zoning ordinance that  
18 balances the competing interests between agricultural and  
19 commercial uses, plaintiffs bring this action to challenge  
20 that balance.

21 THE COURT: How would you describe the  
22 administration of the ordinances by the Township officials who  
23 testified in this case by deposition?

24 MR. RAJSIC: Your Honor, I would describe it as --  
25 first of all I have to address Supervisor Manigold was not

1 charged with the enforcement of the ordinance.

2 THE COURT: He's the supervisor, isn't he?

3 MR. RAJSIC: He is -- he was the supervisor, but,  
4 your Honor, there is a zoning enforcement administrator that  
5 is charged with --

6 THE COURT: And he reports to who?

7 MR. RAJSIC: Your Honor, I would assume to the  
8 entire Township board, not just --

9 THE COURT: You assume? Doesn't the Township zoning  
10 administrator report to the Township board like any other  
11 Township official?

12 MR. RAJSIC: I would agree the entire Township --

13 THE COURT: So answer my question about the  
14 administration of the ordinance as described by Mr. Manigold  
15 and Ms. Deeren.

16 MR. RAJSIC: I would say the enforcement of the  
17 ordinance, your Honor, has been strained over the years and  
18 under certain instances could be considered inconsistent  
19 given that there are --

20 THE COURT: Could be considered to be inconsistent?  
21 Are you serious?

22 MR. RAJSIC: Your Honor --

23 THE COURT: Isn't it manifested that it was  
24 inconsistent?

25 MR. RAJSIC: I would note that again we have

1 different individuals who interpreted our zoning ordinance  
2 over a period of years, so, yes, I would say that when those  
3 different individuals interpreted the zoning ordinance, there  
4 were inconsistencies over the years.

5 Over the past six months, substantial link has been  
6 devoted to this case. Before trial, the parties submitted  
7 voluminous pretrial briefing on the issues that remained for  
8 trial. We submitted proposed findings of fact and conclusions  
9 of law, which distilled the proofs down, and we've relied on  
10 those in our post-trial briefing. And, again, this Court  
11 heard more than two weeks of trial testimony, with hundreds of  
12 exhibits and testimony by the plaintiffs and defendant expert.  
13 Hundreds of pages of post-trial briefing were submitted  
14 summarizing what occurred at trial.

15 With all of that briefing, your Honor, sometimes, and  
16 perhaps even I'm guilty of it, lose track of the bigger  
17 picture, what was resolved before trial and what issues  
18 remained to be addressed at trial.

19 There were a set of critical issues that were resolved by  
20 the Court before trial that take care of a number of claims  
21 and potential damages. First, on the regulatory takings  
22 claim, the Court resolved that on summary judgment in  
23 defendants' favor. The Court also resolved the freedom of  
24 association and freedom of religion claims on summary judgment  
25 in defendants' favor. The Court also found that event hosting

1       does not implicate the First Amendment. This is something  
2       that was addressed both in pretrial briefing and live at  
3       trial, your Honor, and as the Court concluded, that issue was  
4       not a live trial issue in terms of event hosting, and it does  
5       not implicate the First Amendment.

6           And I have to say, we've heard a significant amount of  
7       testimony at trial that relates to event hosting and then  
8       argument regarding event hosting after the trial considering  
9       that that issue was no longer live.

10           Additionally, the Court concluded that the Township was  
11       immune to any claim for damages on a preemption claim. While  
12       the preemption claim was resolved, some in favor of the  
13       Township, some in favor of the plaintiffs, the Court did  
14       conclude that the Township was immune from any damages as  
15       alleged in a preemption theory.

16           The Court also concluded Section 8.7.3(10)(u) has not  
17       been applied to Bonobo, Chateau Grand Traverse, Brys,  
18       Hawthorne, or Bowers Harbor.

19           This is important because the resolution of these issues  
20       before trial resolved a significant number of categories of  
21       damages sought in plaintiffs' case, substantially limiting any  
22       potential relief. While plaintiffs' damages claim has always  
23       been nebulous and untethered to particular ordinance sections,  
24       the following categories or schedules from the much-discussed  
25       Eric Larson expert report have been fully resolved in the

1 Township's favor. First, there's no damages for event  
2 hosting. No matter how you caption them, this Court concluded  
3 that it's not an activity that's protected by the First  
4 Amendment. So regardless if it relates to commercial speech  
5 or due process void for vagueness, that issue was resolved  
6 either pretrial or on the first day of trial.

7 There's no damages related to restaurants or catering, no  
8 matter what theory that that's put under, either preemption or  
9 regulatory takings. If it's under regulatory takings, there's  
10 no viable claim because the Court has dismissed regulatory  
11 takings on summary judgment.

12 Similarly if it's based on preemption, even if the  
13 ordinance was preempted, there's no viable damages claim  
14 against Peninsula Township.

15 The damages claim as it relates to hours of operation was  
16 initially pled as part of a preemption claim. And, again, the  
17 Court declined to enter any judgment against the Township for  
18 money damages based on the preemption claim. At trial, that  
19 morphed into this now Sanderson claim discussing whether or  
20 not the due process void for vagueness claim could be a  
21 vehicle for money damages for hours of operation against the  
22 Township.

23 We addressed that issue at length in our post-trial  
24 brief, but I just want to note briefly, your Honor, the  
25 Sanderson case and its progeny in the Sixth Circuit deals with

1 due process when the right to operate a business in its  
2 totality has been shut down. In Sanderson, the plaintiff  
3 was -- he opened the pool hall, and the local municipality  
4 came and shut down the pool hall's operation in its entirety.  
5 Essentially all of the bundle of rights, the sticks and the  
6 bundle of rights were rejected. He could no longer operate  
7 his entire business.

8 In this case, it's a very different story. The only  
9 right that -- to the extent the plaintiffs have a right to  
10 stay open until a particular time, they otherwise were able to  
11 continue to operate their businesses as a going concern. They  
12 could still be open. They could still host events. They  
13 could still host groups in their tasting room. It's a very  
14 different case than what's pled in Sanderson.

15 Your Honor, I will leave the briefing as it is, but  
16 there's a substantial amount of discussion in our post-trial  
17 brief regarding the application of Sanderson.

18 Finally, the only remaining categories of damages in this  
19 case after the pretrial and trial resolution of certain issues  
20 are the grape cost schedules in Mr. Larson's report and the  
21 schedule for merchandise, and we're going to address each one  
22 of those schedules and the potential damages as we move  
23 through the argument.

24 So in light of that, what are the issues that were left  
25 live at trial to be resolved? We have a series of five

1 issues. This is something that we've argued both before trial  
2 and after trial. The Dormant Commerce Clause, there's a  
3 question regarding what damages would be available to the  
4 plaintiffs and injunctive relief. Due process void for  
5 vagueness, what damages, if any, and injunctive relief.  
6 Preemption, while that's been fully resolved, we do still have  
7 the question of what injunctive relief, if any, would be  
8 available on the preemption theory.

9 The biggest issue that was left live for trial is the  
10 First Amendment claim. We note that there's a merits issue to  
11 be addressed there, Central Hudson, which both sides are going  
12 to argue significantly as what is the outstanding issue  
13 essentially on liability for Central Hudson.

14 And then finally we have a damages question and  
15 injunctive relief. Even if the Court were to conclude that  
16 Central Hudson -- the Township was not regulating commercial  
17 speech, we do have the compelled speech and prior restraints  
18 issues for damages that do need to be resolved.

19 And finally, there's the laches defense that was left  
20 live for trial.

21 As I noted, your Honor, the largest remaining question  
22 for trial was the proofs as it relates to liability under  
23 Central Hudson. The First Amendment issue involves issues of  
24 liability and relief. Plaintiffs' First Amendment theories  
25 that do remain are commercial speech, prior restraints, and

1 | compelled speech.

13                   The second issue is is the asserted governmental interest  
14                   substantial. This Court ruled before trial that Peninsula  
15                   Township's asserted governmental interests are substantial, so  
16                   there's no reason or need to put on any proofs at trial  
17                   regarding that issue. The Court has resolved that.

18                   The third question is does the regulation directly  
19                   advance the governmental interest. This was a question that  
20                   was left live for trial. How does the regulation directly  
21                   advance the governmental interest.

22           And, finally, is the regulation not more extensive than  
23           is necessary to serve that interest. That was another issue  
24           that the Court left pretrial to be resolved on the proofs.

25 I want to note that this is not a least restrictive means

1 test. The Supreme Court has especially rejected that notion.  
2 Instead what is required is a reasonable fit between the  
3 legislature's ends and the means chosen to accomplish it.

4 So, what were the five sections of the PTZO that this  
5 Court ruled before trial implicated speech and therefore we  
6 needed to dive into the Central Hudson analysis?

7 The first section we look at is Section  
8 6.7.2(19)(b)(1)(v). This ordinance section relates to farm  
9 processing facilities. The next two sections,  
10 8.7.3(10)(u)(1)(b) and (10)(u)(5)(h) relate to winery  
11 chateaus. And, finally, 8.7.3(12)(i) and (k) are for farm  
12 processing facilities. So at trial, the Township was left to  
13 first establish that the five sections directly advance their  
14 interest that this Court has held were substantial and that  
15 the challenged sections were not more extensive than  
16 necessary.

17 At trial, the Township presented proofs that establish  
18 both prongs. First, the Township presented an extensive  
19 legislative history, meeting minutes that stretch decades, the  
20 master plan, and the Peninsula Township Zoning Ordinance  
21 itself, all of which document how the challenged sections  
22 directly advance the governmental interest and how the  
23 Township worked to find a reasonable fit between the ends and  
24 the means that they had chosen.

25 Second, Dr. Daniels presented unrebutted testimony as a

1 land use planning expert. Dr. Daniels' testimony established  
2 how the challenged sections of the PTZO relate to agriculture  
3 and how the harms the Township is trying to prevent are  
4 materially reduced by the ordinance sections.

5 Plaintiff offered no direct rebuttal to Dr. Daniels'  
6 testimony. While they had identified a land use planning  
7 expert and identified him as a trial witness, for whatever  
8 reason he was not called at trial. Plaintiffs instead called  
9 Gary McDowell and Teri Quimby as their rebuttal experts to  
10 Dr. Daniels.

11 Mr. McDowell was identified as an expert in rural  
12 development, agriculture preservation, and agricultural  
13 tourism, but he had no opinions regarding any of the actual  
14 sections of the PTZO. And even then, portions of his  
15 testimony were strikingly beneficial to the Township, in  
16 particular, his testimony regarding the effectiveness of the  
17 Township's efforts to fit the ordinance to the harms.

18 The evidence presented at trial shows that the PTZO  
19 sections that are challenged under the Central Hudson analysis  
20 do not implicate commercial speech, and they're not subject to  
21 protection under the First Amendment. But even if they did  
22 relate to commercial speech and implicated First Amendment  
23 protections, plaintiffs failed to present evidence as to how  
24 they were damaged.

25 Let's look first at Section 6.7.2(19) (b) (1) (v). This

1       relates to the sale of logo'd merchandise for farm processing  
2       facilities. Plaintiffs claim they're damaged because the  
3       ordinance limits the sale of certain merchandise, including  
4       clothing sales and coffee cups, but the farm processors are  
5       already selling those goods. Two Lads sells a wide variety of  
6       logo'd merchandise in their tasting room, which is, as they  
7       testified, a good form of advertising for Two Lads because it  
8       turns people into walking advertisements. Their merchandise  
9       sales include hats and T-shirts.

10       Black Star, another farm processing facility, sells  
11       logo'd merchandise in their tasting room that promotes Black  
12       Star. They testified it's a good thing for the winery to sell  
13       merchandise because it turns their -- the people that buy  
14       those goods into brand ambassadors. The merchandise they sell  
15       includes shirts, sweatshirts, hats, tumbler mugs, and wine  
16       glasses in their tasting room.

17       Finally, Tabone, the last alleged farm processing  
18       facility in this case, claims it wants to sell more  
19       merchandise but agrees that they already sell T-shirts, hats,  
20       sweatshirts, and mugs in their tasting room. These are all  
21       things they claim they can't sell under the section of the  
22       ordinance, but they're selling them all already.

23       The next section that's challenged is 8.7.3(10)(u)(1)(b).  
24       This section regulates the promotion of Old Mission Peninsula  
25       agriculture at guest activity uses. There was no testimony

1           that the promotion of Peninsula agriculture caused the  
2           plaintiffs any damages at trial. In fact, the promotion of  
3           those products at events is part and parcel to the success of  
4           the wineries. They want to promote Peninsula-produced food  
5           and beverages, in particular the beverage being the wine that  
6           they promote at their events. Promoting Peninsula agriculture  
7           is exactly what the wineries want to do.

8           Section 10(u)(5)(h) indicates that there are no outdoor  
9           displays of merchandise, equipment, or signs at guest activity  
10          uses. There was no testimony how this section caused the  
11          plaintiffs any lost profits or how they were harmed in any  
12          way.

13          The next ordinance section, 8.7.3(12)(i), relates to the  
14          retail sale of nonfood items which promote the winery or  
15          Peninsula agriculture and has the winery, excuse me, the  
16          winery logo permanently affixed. These two sections of the  
17          ordinance relate only to Peninsula Cellars as the single  
18          remote winery tasting room on Peninsula Township.

19          Peninsula Cellars already sells logo'd merchandise and  
20          agrees they want to sell logo'd merchandise because people  
21          wearing those items or purchasing them become brand  
22          ambassadors. They prefer to sell items that are branded.

23          Section (12)(k) of the ordinance indicates that signs and  
24          other outdoor advertising may not promote, list, or in any way  
25          identify any of the food or nonfood items allowed for sale in

1 the tasting room. But, again, Peninsula Cellars testified at  
2 trial that it already does advertise items for sale in the  
3 tasting room and identifies the purchase price.

4 Additionally, Peninsula Cellars engages in marketing  
5 efforts, including social media, print media, and even  
6 television media.

7 After considering the commercial speech claims from both  
8 a liability and damages perspective, the next issue relates to  
9 the prior restraints and compelled speech theories from trial.

10 While the Court concluded that two sections of the  
11 Peninsula Township Zoning Ordinance were prior restraints and  
12 two sections of the Peninsula Township Zoning Ordinance  
13 constituted compelled speech, plaintiffs still needed to  
14 present evidence at trial that they were damaged by those  
15 sections of the ordinance.

16 Section 8.7.3(10)(u)(2)(b) permits hosting of certain  
17 501(c)(3) nonprofits from Grand Traverse County.  
18 Additionally, 8.7.3(10)(u)(2)(c) permits hosting of  
19 agriculture-related groups. Plaintiffs Mari and Chateau  
20 Chantal failed to present evidence that they suffered damages  
21 as a result of either of these sections.

22 Chantal has never requested to host a 501(c)(3) nonprofit  
23 or agriculture-related group, and Mari failed to present any  
24 evidence that it was denied to host either a 501(c)(3) or an  
25 agriculture-related group.

1                   The next two sections deal with compelled speech. Again,  
2 while the Court found that these two sections compelled  
3 speech, plaintiffs offered no evidence that they were damaged  
4 by allegedly being compelled to speak as it relates to under  
5 8.7.3(10) (u) (1) (b). This is the intent provision of the guest  
6 activity use section of the ordinance. It doesn't guide any  
7 conduct, and it's not an operative section of the ordinance,  
8 and there's no plaintiff -- evidence that the plaintiffs were  
9 damaged by the section of the ordinance.

10                  10(u)(5)(a) requires the guest activity uses include  
11 agricultural protection promotion as part of the activity.  
12 But, again, the evidence that was established at trial was  
13 that the plaintiffs do want to promote Peninsula agriculture  
14 because it includes their own products. They obviously want  
15 to promote their own products during their events.

16                  In sum, the plaintiffs failed to present evidence that  
17 they have been damaged or had any lost profits as a result of  
18 these ordinance sections.

19                  Plaintiffs relied on the testimony of Eric Larson to  
20 quantify their alleged damages, but it's important to note  
21 that Mr. Larson had a number of failings in his expert report  
22 and testimony at trial. Mr. Larson failed to offer testimony  
23 regarding damages that are recoverable as a matter of law, and  
24 his testimony and report are not reliable.

25                  Mr. Larson never attempted to calculate lost net profits

1 on any aspect of plaintiffs' businesses, which is required for  
2 an award of lost profits. Instead, Mr. Larson's damages  
3 theory is predicated only on a claim for alleged loss of gross  
4 profits without even attempting to consider net profits. As  
5 he testified at trial, he has no opinion whatsoever in this  
6 case as to what the lost net profits are. He agreed, lost net  
7 income I do not have an opinion regarding that.

8 THE COURT: What's your reaction to the caselaw  
9 cited by Mr. Infante to support Dr. Larson's opinion?

10 MR. RAJSIC: If I'm correct in recalling what  
11 Mr. Infante's caselaw was, it dealt when there is sufficient  
12 showing of lost net profits based on a business that was  
13 already in existence. And in these instances, the businesses,  
14 as we talked about here, the wineries on Old Mission  
15 Peninsula, have a long history of being in business. There is  
16 data that Mr. Larson could have collected: Income tax  
17 returns, profits and losses, cost of goods sold, a whole host  
18 of documents that he could have requested, he could have  
19 collected, he could have analyzed in order to arrive at his  
20 conclusions in this case, and he didn't look at any of it.

21 The only thing that Mr. Larson looked at to arrive at his  
22 conclusions was the damages matrix that was prepared by the  
23 plaintiffs and submitted through counsel to Mr. Larson for his  
24 review. He didn't actually look at any of the financial data,  
25 which was all readily available to him if he had simply asked

1 for it in order to arrive at his conclusions.

2 THE COURT: Other than the subject matter of your  
3 cross examination of Dr. Larson, what evidence is there in the  
4 record contrary to his opinion?

5 MR. RAJSIC: Regarding --

6 THE COURT: From the Township's perspective. Did  
7 the Township produce any witness to rebut Dr. Larson directly?

8 MR. RAJSIC: No, your Honor, we did not have a  
9 damages expert despite, obviously, our intent and efforts to  
10 secure a damages expert to testify at trial. We didn't rely  
11 simply on attorney's statements, though, as I would like to  
12 point out. It was based on cross examination of Mr. Larson's  
13 work, cross examination of Mr. Larson himself at trial, which  
14 pointed out all of these deficiencies in his report. It was  
15 also based on the documents that we introduced through the  
16 cross examination of Mr. Larson, including the RMA guidelines,  
17 which I think is important to note that the RMA guidelines  
18 that Dr. Larson bases his entire opinion on contain a  
19 percentage of net profits that Mr. Larson could have looked  
20 at, that he could have relied upon in reaching his  
21 conclusions, but he ignored the net profit calculation in  
22 favor of a gross profit calculation. As he testified at  
23 trial, if he had simply looked at the RMA in there and run the  
24 RMA net profit calculation, he agreed net profits would have  
25 been approximately one-thirteenth of the amount of damages

1                   that were shown that he testified to in his report and his  
2                   testimony at trial.

3                   So, again, that information was available to him, and he  
4                   didn't even consider it. And it's not just RMA. It's the  
5                   lack of information that he obtained that would be any sort of  
6                   reasonable basis for him to arrive at his conclusions.

7                   It's not just RMA, though, your Honor. Mr. Larson's  
8                   testimony confirmed that he failed to comply with the American  
9                   Institute of Certified Public Accountant standards for  
10                   forensic services in arriving at his conclusions. Mr. Larson  
11                   agreed that those standards applied to his work in this case  
12                   as an expert witness and he should be held to them.

13                   The AICPA standards indicates under Number 6 that the  
14                   expert needs to engage in sufficient planning and supervision.  
15                   They need to adequately plan and supervise the performance of  
16                   the professional services, and they need to rely on sufficient  
17                   relevant data. They need to obtain sufficient relevant data  
18                   to afford a reasonable basis for conclusions or  
19                   recommendations in relationship to any professional services  
20                   that are performed.

21                   But, again, in this case Mr. Larson didn't supervise any  
22                   aspect of this requesting, formulating, or obtaining any  
23                   underlying current or historic financial data. He didn't  
24                   provide plaintiffs with any instruction for what information  
25                   to gather for their damages matrix. He didn't send a request

1 for documents. He didn't review or ask to review any  
2 financial statements. And while compilation of documents is  
3 very important for the project, he didn't oversee it or send  
4 anyone from his office to oversee that. Instead, he sent a  
5 blank damages matrix and didn't know who participated in  
6 compiling that information and then it was simply provided  
7 back to him. The only evidence regarding the validity of the  
8 numbers in the damages matrix is plaintiffs' counsel  
9 assurances to Mr. Larson that the numbers were accurate. And  
10 most damningly, Mr. Larson never obtained or reviewed any  
11 current or historic financial data from the wineries, no tax  
12 records, no profit and loss reports, no cost of goods sold  
13 records, no records regarding operating percentages or net  
14 profit percentages.

15 Mr. Larson failed to support his lost profit calculation  
16 with any sufficient evidence that would be reliable on at  
17 trial. And I think it's also important to note that during  
18 closing argument, Mr. Infante indicated that if there was  
19 evidence regarding incremental costs for RMA purposes, that  
20 that evidence then could be used to support the damages  
21 calculation in this case, but Mr. Larson testified at trial  
22 that there are no incremental costs. Excuse me, he never  
23 testified that there are incremental costs, and he had no clue  
24 what those incremental costs might be.

25 Additionally, we would note that there's no issue with

1 Mr. Larson using the RMA data. That was something that was  
2 pointed out in closing argument was is it effective to use the  
3 RMA data, but that's not the issue. The issue is that the RMA  
4 data needs to be used correctly, and that's not what  
5 Mr. Larson did in this case. He failed to use the RMA data  
6 effectively, and so his report and calculations are rendered  
7 suspect.

8                   Mr. Larson also failed to support his lost profits  
9 argument, either gross or net, with sufficient evidence  
10 rendering his calculations speculative at best. He performed  
11 no market analysis. He performed no feasibility studies.  
12 And, again, he didn't obtain a single financial document. He  
13 was simply provided a damages matrix and performed  
14 multiplication to arrive at his numbers. And he didn't have  
15 any checks or balances regarding what those calculations were  
16 and if they were effective and a proper measure of damages in  
17 this case.

18 Over the course of trial, your Honor, through the hours  
19 of testimony and hundreds of exhibits that were submitted,  
20 Peninsula Township established under Central Hudson that in  
21 addition to its interests being substantial, the sections of  
22 the Peninsula Township ordinance were advanced through the  
23 tailoring that the Township engaged in, and the means extended  
24 were not more extensive than necessary to achieve those.

Finally, even on the limited damages issues which

1 remained, and it's important to note that it's two schedules  
2 that were not resolved by this Court before trial, and that's  
3 grape costs and cost of merchandise. Even on those limited  
4 damages issues, plaintiffs' evidence at trial demonstrated the  
5 sheer volume of activities, events, merchandise and goods that  
6 they sell on their properties while catering to thousands of  
7 guests on a daily basis. They fail to prove that they're  
8 harmed in any way by the ordinance sections that are  
9 challenged and left live for trial.

10 Defendant Peninsula Township would ask the Court to enter  
11 a judgment in its favor, and otherwise, your Honor, I'll rest  
12 on the significant briefing that was submitted both before and  
13 after trial unless you have any questions, your Honor.

14 THE COURT: What do you make of Mr. Infante's  
15 argument as it relates to Dr. Daniels' testimony?

16 MR. RAJSIC: Which -- not to -- which argument  
17 regarding Mr. Daniels, because there were quite a few slides  
18 as it relates to Mr. Daniels.

19 THE COURT: Well, basically the attack on  
20 Dr. Daniels is what he didn't do.

21 MR. RAJSIC: Understood, your Honor.

22 THE COURT: You have made significant argument as it  
23 relates to what Dr. Larson didn't do. What's left of  
24 Dr. Daniels' testimony based on the cross examination, and why  
25 should the Court put any stock in it at all?

1 MR. RAJSIC: Your Honor, I think Dr. Daniels, based  
2 on his knowledge and experience as someone who is an expert in  
3 land use planning for their entire career as a professor of  
4 land use planning, he relied on that knowledge and experience  
5 to -- after visiting the Township, as indicated in his report,  
6 and based on his knowledge, he can testify regarding the  
7 Township's efforts to tailor and not have means that were more  
8 restrictive in achieving the Township's substantial  
9 governmental interests. But I will say, I would like to note  
10 I don't want to step on PTP's toes as it relates to this issue  
11 too much, because, again, Dr. Daniels was PTP's expert. We  
12 were not allowed to call a planning expert at trial. So I  
13 don't want to step on PTP's toes when it comes to the  
14 importance of Dr. Daniels' testimony.

15                   And, your Honor, I know that Ms. Hillyer is going to  
16                   address this, but we have tried to tailor our closing  
17                   arguments so that we don't address the exact same thing during  
18                   our arguments, and so that's why I was more focused on  
19                   damages, your Honor. So I don't want to step too much on  
20                   Ms. Hillyer's toes.

24 MR. RAJSIC: I can speak to the JDA that we entered  
25 into once we became involved in this case. Off the top of my

1 head, your Honor, I don't recall exactly when the previous JDA  
2 involving Mr. Meihn's office and PTP was entered into.

3 THE COURT: Because there were certain  
4 representations made to the circuit panel as it relates to  
5 whether the Township was going to be able to protect the PTP's  
6 interest, correct?

7 MR. RAJSIC: I mean, your Honor, I don't know off  
8 the top of my head because it does predate my involvement in  
9 this case.

10 THE COURT: Well, did the decision of the circuit  
11 court note that?

12 MR. RAJSIC: I would be -- it's been a few minutes  
13 since I reviewed that decision, your Honor, so I don't want to  
14 speak out of turn and say yes or no with absolute certainty  
15 one way or the other, but given that that would involve PTP,  
16 perhaps, and I'm not trying to shirk responsibility, but  
17 perhaps it would be something they'd be more knowledgeable on.

18 THE COURT: But this was a representation of the  
19 circuit court on behalf of your client to allow PTP into the  
20 case, right?

21 MR. RAJSIC: I'm not aware of any representations  
22 that were made on behalf of Peninsula Township, your Honor.

23 THE COURT: Well, I think the four squares of the  
24 circuit opinion uses that as one of the linchpins to allow PTP  
25 in the case, and then after it comes back to this Court

1 there's a joint defense agreement, and I'm just wondering how  
2 is that consistent?

3 MR. McGRAW: Your Honor, Mr. Rajsic may not know, we  
4 became involved in the case the January after the Sixth  
5 Circuit decision.

6 THE COURT: But you're stuck with what happened  
7 before, correct?

8 MR. McGRAW: We're stuck.

9 THE COURT: And I'm trying to find out when the  
10 joint agreement was made as it relates to the deliberations of  
11 the circuit court regarding PTP getting in the case.

12 Ms. Hillyer, do you know?

13 MS. HILLYER: Your Honor, I apologize, Mr. Rajsic  
14 has my laptop.

15 THE COURT: Did you steal the laptop?

16 MR. RAJSIC: I did, Your Honor.

17 MS. HILLYER: What I'd like to clarify is that  
18 there's a difference between the joint defense agreement and  
19 intervention, so --

20 THE COURT: Now wait a minute. Wasn't there a  
21 representation made by either PTP or the Township that the  
22 Township could not represent PTP and the interests of the  
23 two -- the two parties might be different, true, and wasn't  
24 that one of the linchpins of the circuit decision?

25 MS. HILLYER: So the question for intervention is

1                   whether or not the Township can adequately represent PTP's  
2                   interests, and it cannot, and it has not. The joint defense  
3                   agreement is about privilege and about ensuring that  
4                   communications between codefendants can remain privileged.  
5                   They're separate issues. Although they have been conflated, I  
6                   think plaintiffs have argued these things are relevant,  
7                   they're completely separate analyses, and the Township to this  
8                   day does not adequately represent PTP's interest, although we  
9                   tried to coordinate our presentation of evidence at trial.

10                   THE COURT: Okay. Thank you.

11                   MR. RAJSIC: And just to be clear, again, your  
12                   Honor, I can speak to when our JDA that involves PTP's office  
13                   and ours was in. It was in 2023, but I don't recall exactly  
14                   the dates. But any JDA before then, it may be in my file, but  
15                   I don't know the date in front of me, your Honor.

16                   THE COURT: All right. Fair enough. I recognize  
17                   there's been a change in representation of the Township.

18                   MR. RAJSIC: And change in strategy as well, but  
19                   that's neither here nor there. I would be happy to answer any  
20                   other questions, your Honor; otherwise, at this point we would  
21                   rest on our briefing.

22                   THE COURT: Okay. Thank you. That's all for now.  
23                   Ms. Hillyer, go ahead.

24                   MS. HILLYER: Thank you, your Honor. Holly Hillyer  
25                   on behalf of Protect the Peninsula.

1           By way of providing a road map, I'm going to, as I  
2 mentioned, try not to overlap with what the Township just  
3 presented. I am going to talk about one issue that was not  
4 ripe for trial but that plaintiffs raised and that I think  
5 warrants a response. It's the intervention issue that we've  
6 talked about. And I'm going to talk about two of the three  
7 main issues that were ripe for trial.

8           I believe the Township talked about there being five  
9 issues and kind of organized things a little bit differently.  
10 We saw there being three main issues for trial: The  
11 commercial speech question, the question of damages, which PTP  
12 will not weigh in on, and then the question of injunctive  
13 relief.

14           We will not address the plaintiffs' new claims, unpleaded  
15 claims, the Sanderson issue, unless your Honor has questions,  
16 the requests to revisit certain findings that were made in  
17 summary judgment. We briefed those extensively in our  
18 pretrial brief and in our post-trial brief, and we'll rely on  
19 our briefing for those issues.

20           So the nontrial issue is PTP's intervention. Plaintiffs  
21 have called for our intervention to be revoked, and I want to  
22 make it clear that intervention has been resolved. The Sixth  
23 Circuit has spoken on it. This Court has spoken on it. There  
24 were no intervention-related issues left for trial. Trial is  
25 about the claims and the defenses of the parties. Plaintiffs

1 brought their claims; the defendants defended against their  
2 claims. Intervention and whether PTP's interests were  
3 sufficient for intervention purposes were not a claim or a  
4 defense, and they weren't ripe for trial.

5 And to the extent that plaintiffs suggest that PTP did  
6 not do enough at trial because we did not separately cross  
7 examine witnesses, we did what we said we would do in  
8 defending the challenged zoning ordinance. We conducted  
9 discovery to get a full legislative history.

10                   We conducted 30(b) (6) depositions of every party.  
11                   Previously no one had deposed -- conducted any 30(b) (6)  
12                   deposition. There were lay witness, fact witness depositions.  
13                   We filed a motion for summary judgment. This Court directed  
14                   PTP to file a motion for summary judgment on the issues that  
15                   the Court determined PTP had an interest in. We did that. We  
16                   participated in other motion practice. We presented an expert  
17                   witness, and we cross examined plaintiffs' offered rebuttal  
18                   witnesses.

19                   And in case anyone has forgotten, plaintiffs filed a  
20 motion in limine asking the Court to order us to coordinate  
21 our presentation of evidence at trial with the Township.  
22 Plaintiffs asked us to not duplicate cross examination. So  
23 the Court declined to grant their request, but, your Honor,  
24 you urged us to not waste time, and that is what we have tried  
25 to do.

1           We filed a joint trial brief. We filed joint conclusions  
2           of law, findings of fact, and we didn't duplicate cross. And  
3           today I'm going to do my best not to duplicate their closing  
4           argument.

5           So we would ask the Court to just at this point not  
6           entertain plaintiffs' request to relitigate intervention, but  
7           if you have questions about it, I'm happy to answer them.

8           So moving on to the evidentiary issues for trial, as I  
9           mentioned we had commercial speech, damages, and injunctive  
10          relief as the three main buckets that were live for trial.  
11          And the Township has gone through the five subsections that  
12          were subject to the Central Hudson inquiry. There were two of  
13          the four Central Hudson prongs left, and those were the  
14          questions of whether or not the ordinances directly advanced  
15          substantial governmental interests and were narrowly drawn.

16          And then skipping over damages to injunctive relief,  
17          there were several claims where plaintiffs either have  
18          prevailed or things that have yet to be determined, and so for  
19          any -- any ordinance provision that has been found  
20          unconstitutional or preempted, there's a question about  
21          whether and to what extent plaintiffs have proven entitlement  
22          to injunctive relief.

23          So I think we all are now familiar with these five  
24          subsections. I'm not going to repeat what these were. I'm  
25          going to skip this slide, and I'm going to talk about the

1 evidence that was presented at trial. And there were three  
2 types of evidence that were presented primarily. There were  
3 the meeting minutes and the contemporaneous records of  
4 Peninsula Township, the legislative history, there was expert  
5 testimony, and there were lay witness depositions.

6 The meeting minutes go back to the late '80s. And you  
7 can see from the type face there, right, they are old minutes.  
8 These are, I think, Bowers Harbor from 1992. And there were  
9 discussions spanning hundreds of pages, probably thousands of  
10 hours, more meetings than I can imagine, discussing all of the  
11 zoning provisions that are challenged and all of the requests  
12 for special use permits under these provisions, amendments to  
13 special use permits. All of these were deliberated by the  
14 planning commission, by the township, sometimes by special  
15 committees.

16 And the minutes tell a story. And the minutes couldn't  
17 testify, but the minutes are the key witness that show how the  
18 Township was trying to follow its master plan and keep  
19 commercial activity in A-1 tethered to agricultural  
20 production.

21 And I want to be clear, the Township mentioned this, but  
22 it is true Central Hudson does not require a least restrictive  
23 means inquiry. It is about a reasonable fit. And this is  
24 what the Township was trying to accomplish over these decades  
25 of meetings. They were trying to achieve a reasonable fit and

1 to tailor the zoning ordinances they drafted when it enacted  
2 them back in 1999, in 1998, 2002, 2004, and they spent  
3 countless hours gathering input from the community, conducting  
4 surveys, reviewing the master plan, reviewing reports, having  
5 committees work on reports, taking public comment, debating,  
6 trying to wordsmith and refine draft language over many  
7 months.

8 And I also want to be clear that they did consider  
9 alternatives. The alternatives they considered were the  
10 plaintiffs' proposals. So none of these ordinances sort of  
11 just sprang from the mind of Township officials. Most of  
12 these were the result of requests that winery owners or  
13 perspective winery owners made.

14 So the alternatives that were considered were things like  
15 Bob Begin's original request to have a resort in the Township.  
16 Going back to the '80s and early 90s, he was asking for  
17 weddings and unlimited events and conference center activities  
18 and a pool and other kinds of things, and the Township reached  
19 the ordinances that we have today by considering those  
20 alternatives to what we have now, by reviewing the requests  
21 that were before it, and trying to make sure that they said  
22 yes to as much as they could while maintaining a connection to  
23 agriculture. And these minutes were unrebutted, and they're  
24 mostly unaddressed.

25 Plaintiff submitted I think a 145-page post-trial brief,

1 and they don't talk about what's in the minutes. And I  
2 understand that there are a lot of pages, but we have a road  
3 map to the minutes, and it's in our joint findings of fact.  
4 So we have got hundreds and hundreds of pages of minutes  
5 condensed to about 40 pages of individual facts with citations  
6 to each set of minutes, and this is where the story of  
7 township zoning lies. And these, we would submit, are the  
8 most compelling and most probative pieces of evidence for  
9 Central Hudson purposes.

10 So talking about the experts now. Plaintiffs have made a  
11 lot about how Dr. Daniels is from Pennsylvania, but I would  
12 point out that he is a nationally recognized expert on land  
13 use planning. He has worked on land use planning issues all  
14 over the country. He has evaluated Peninsula Township's  
15 purchase of development rights program which is the Township's  
16 key agricultural preservation program.

17 And Dr. Daniels testified about how challenged zoning  
18 works to advance the Township's governmental interests. He  
19 was the only witness to talk about the zoning ordinances.  
20 Plaintiffs have attacked his credibility for things like  
21 opining that a tasting room is something that should be  
22 indoors. And, sure, in Michigan, the Michigan Liquor Control  
23 Code allows for outdoor wine tasting. In fact, the Township  
24 allows for outdoor wine tasting.

25 So as an agricultural preservation and land use planning

1 scholar, Mr. Daniels, or Dr. Daniels, probably does have a  
2 more conservative opinion about what is appropriate in an  
3 agricultural zone, but what that shows is reasonable minds can  
4 differ about what is appropriate in the land use world and  
5 what is appropriate in an agricultural zone. And what  
6 Dr. Daniels has said over and over again and what the law says  
7 is that it's up to communities to draw those lines for  
8 themselves through the legislative process. And plaintiffs  
9 have attacked Dr. Daniels for not reviewing Michigan Liquor  
10 Control Code, for not reviewing the Right to Farm Act or the  
11 GAAMPs.

12 THE COURT: That's not important?

13 MS. HILLYER: I would submit, your Honor, they're --

14 THE COURT: How does Dr. Daniels come in and give  
15 his opinions when he has not reviewed those materials?

16 MS. HILLYER: So those materials are from separate  
17 bodies of law. Dr. Daniels is an expert on land use planning  
18 and zoning. And land use planning and zoning doesn't  
19 necessarily look to the Michigan Liquor Control Code or other  
20 state bodies of law or policy. So Dr. Daniels was not an  
21 expert on alcohol policy. He was not an expert on Michigan's  
22 Right to Farm Act or rural development. And I would point out  
23 that the GAAMPs were enacted, the ones that plaintiffs rely so  
24 heavily on. They were written in 2010, and the last of the  
25 zoning provisions that we're talking about today was enacted

1           in 2004. So we're six years too late in terms of even  
2           considering the GAAMPs. What matters for Central Hudson  
3           purposes is what the Township considered when it did the  
4           tailoring.

5           The Township could not have foreseen that six years later  
6           rural development policy in Michigan would evolve in such a  
7           way, and so what we have to look at for Central Hudson  
8           purposes in determining the constitutionality of the  
9           legislative acts that the Township did, we have to look to  
10           when they did them.

11           So Dr. Daniels' testimony essentially went unrebutted.  
12           Plaintiffs had designated a land use planning expert. They  
13           didn't call him. They didn't try to admit his report. They  
14           called experts on liquor control policy and rural development  
15           and agritourism. And at the end of the day, this is because  
16           the plaintiffs want to use Ms. Quimby and Mr. McDowell to  
17           revive their preemption claims, their agritourism theory, and  
18           bolster their injunction claim. They don't have any value for  
19           Central Hudson purposes. And I'm going to talk about the  
20           injunction issue in a few minutes, but first I want to touch  
21           on the deposition designations.

22           So plaintiffs have relied a lot on the depositions of  
23           Mr. Manigold and Ms. Deeren, but there are actually six  
24           witnesses who were deposed around the same time, and all of  
25           them had different relationships to the zoning ordinance.

1       Three of them were sort of co-architects of the zoning  
2       ordinances. Mr. Parsons, Mr. Wunsch, and Mr. Hayward all took  
3       part in drafting the zoning amendments that are challenged  
4       now.

5           Mr. Manigold was the supervisor, and his role was to vote  
6       on zoning amendments and SUPs. Ms. Deeren was the zoning  
7       administrator for a time, so she was primarily tasked with  
8       administering the zoning ordinance, approving land use  
9       permits. And then Mr. Sanger was the zoning enforcement  
10      officer. He's the guy that comes out and writes tickets and  
11      enforces the zoning ordinance.

12       So plaintiffs rely mostly on Mr. Manigold and to some  
13      extent Ms. Deeren's testimony, and they rely on the same --  
14      the same lines. We have actually seen most of the same quotes  
15      from these two individuals in their summary judgment briefs  
16      going back to 2021. But Mr. Manigold, he was not tasked with  
17      administering or interpreting or enforcing the zoning  
18      ordinance. And mostly he didn't know or he didn't remember.  
19      He struggled to answer a lot of plaintiff counsel's questions,  
20      partly because many of them called for legal conclusions.

21       He also talked at length about how the zoning ordinance  
22      was designed to help plaintiffs, and much of his testimony  
23      expressed confusion about what it would mean to consider less  
24      restrictive means when the Township was considering  
25      Plaintiffs' proposals. And so the context of his testimony

1 and of what was happening when the Township was enacting these  
2 ordinances was that the plaintiffs had been coming to the  
3 Township and asking for things. And so Mr. Manifold's  
4 testimony reflects confusion in a lot of places, but certainly  
5 weighed against the minutes and placed in context does not  
6 counter defendants' Central Hudson evidence, which are the  
7 meeting minutes and the expert testimony.

8 So to talk about injunction, plaintiffs have asked for  
9 injunctive relief, and there are six claims, or six topics.  
10 And I'm not going to repeat all. Gosh, there are many, many  
11 zoning ordinance provisions, especially relating to guest  
12 activity uses. I'm not going to cite these, but generally  
13 these are zoning ordinance provisions that address local grape  
14 sourcing, guest activity uses, catering, the compelled speech  
15 promoting Peninsula agriculture during guest activity uses,  
16 and then any provisions that might later be found to restrict  
17 commercial speech. All of these provisions have been repealed  
18 and they have not been part of the zoning ordinance since I  
19 believe December of 2022. So at this point there are no  
20 zoning ordinance provisions to enjoin.

21 THE COURT: Part of the analysis there is a  
22 reasonable expectation that perhaps the Township would revisit  
23 after this litigation is completed. What's your reaction to  
24 that in light of the history here?

25 MS. HILLYER: So I can't speak for the Township, but

1 my reaction is that the Township is going to continue  
2 balancing agricultural versus commercial uses probably forever  
3 or unless and until something else replaces zoning. So  
4 certainly the Township is going to consider, you know,  
5 consider what uses are appropriate in Peninsula Township's  
6 agricultural zone. The zoning has evolved over 30, almost 40  
7 years now there and will continue to do so.

8 But plaintiffs have also asked for winery-specific  
9 relief, and plaintiffs did not put -- plaintiffs did not put  
10 sufficient evidence into the record that would allow the Court  
11 to analyze their special use permits and authorize amendments  
12 to these. They didn't plead what they would want.

13 There is an SUP amendment process that's also a  
14 legislative process like the process for enacting zoning  
15 amendments. So SUPs are amended by -- typically after review  
16 of the planning commission. There's a public hearing, there's  
17 typically a board meeting then and a public hearing, and then  
18 the board is authorized to place conditions on SUPs. There  
19 are vested interests that would be at issue. There are  
20 questions about whether and to what extent plaintiffs have  
21 established a vested interest in some of the uses that they  
22 currently conduct.

23 One big unanswered question is whether you can even have  
24 a vested interest in an unconstitutional land use. So if, for  
25 example, the Court were to find a commercial speech provision

1       that allows them to sell logo'd merchandise unconstitutional,  
2       it's unclear whether one could have a vested interest in an  
3       unconstitutional land use to continue selling logo'd  
4       merchandise.

5           There are questions of severability that have not been  
6       addressed at trial, and one of the big ones is pertaining to  
7       farm processing facilities. So this is the zoning ordinance  
8       that starts with 6.7.2(19). So this ordinance was designed to  
9       allow wineries to have a use by right, so if you grow it you  
10      can sell it. And that was -- that was the -- that was the  
11      balance, and that was the intent in creating that use by  
12      right. And so it is unclear whether or to what extent you  
13      could sever the land use, the permission, the use by right to  
14      have a winery on 40 acres as a use by right from the  
15      appellation 85 percent grape requirement.

16           And finally for individual winery relief, we're missing  
17      land owners. Most of the plaintiffs in this case were  
18      lessees, and because land uses run with the land, the -- in  
19      many cases the special use permit holders were not present at  
20      trial. They're not in this case. These are land uses that we  
21      would be talking about, and without the landowners here to  
22      litigate their interests, it's unclear whether and to what  
23      extent the Court could offer any relief relating to specific  
24      land uses.

25           But I would suggest the third part of plaintiffs'

1 injunctive relief request is that the Court declare new uses  
2 reasonable. And this is where -- this is where the testimony  
3 of Ms. Quimby and Mr. McDowell comes in. This is really what  
4 they're trying to use it for. They're trying to suggest that  
5 the Court can declare certain uses reasonable, and they're  
6 using that testimony to support this claim. They're asking  
7 the Court to violate the separation of powers.

8                   And I would read this quote briefly from a Michigan case  
9                   called Brae Burn, Inc., versus the City of Bloomfield Hills.  
10                  I promise I won't read the whole thing. "In view of the  
11                  frequency with which zoning cases are now appearing before the  
12                  Court," this was in 1957, "we deem it expedient to point out  
13                  again, in terms not susceptible of misconstruction, a  
14                  fundamental principle: This Court does not sit as a  
15                  superzoning commission. Our laws have wisely committed to the  
16                  people of a community themselves the determination of their  
17                  municipal destiny, the degree to which the industrial may have  
18                  precedence over the residential, and the areas carved out of  
19                  each to be devoted to commercial pursuits. With the wisdom or  
20                  lack of wisdom of the determination we are not concerned. The  
21                  people of the community, through their appropriate legislative  
22                  body, and not the courts, govern its growth and its life. Let  
23                  us state the proposition as clearly as may be: It is not our  
24                  function to approve the ordinance before us as to wisdom or  
25                  desirability. For alleged abuses involving such factors, the

1       remedy is the ballot box, not the courts. We do not  
2       substitute our judgment for that of the legislative body  
3       charged with the duty and responsibility in the premises."

4           So courts determine constitutionality, and courts  
5       determine preemption, but courts do not determine the best use  
6       of land. That is -- that is what townships do. That is part  
7       of what Dr. Daniels testified to. And I want to leave you  
8       with this image courtesy of Plaintiffs' Exhibit 112, I  
9       believe. And this is not an accident. This is incredible.  
10      This is miles and miles and miles of agricultural land,  
11      unspoiled beaches just north of Traverse City. And you have  
12      Traverse City, which is crowded with tourists and with traffic  
13      all summer long. It's not just summer anymore. And this  
14      is -- this is just outside of Traverse City, and it is  
15      peaceful and it is tranquil and it is beautiful. And this is  
16      the result of the Township's planning. This what the 30, 40  
17      years of zoning has resulted in. This is taxpayer-funded  
18      preservation efforts. This is PDR. This is the purchase of  
19      development rights. This is Township residents taxing  
20      themselves to buy development rights to make sure that land  
21      stays in agriculture. And this is the result of local  
22      government listening to the requests and the concerns of all  
23      its residents, all of its businesses, including the wineries,  
24      and balancing those interests.

25           The Township has found a way to say yes to almost every

1 request the wineries ever made, but it has very reasonably  
2 decided that event venues, restaurants, late hours, and retail  
3 shops do not belong in here.

4 And township zoning works. What plaintiffs are asking  
5 the Court to do is to step into the role of local government  
6 and give them what they want through litigation because they  
7 can't get it through the legislative process that's been  
8 designed to allow communities to determine what's right for  
9 themselves.

10 The Court has the power to determine what parts of the  
11 PTZO may be unconstitutional or preempted, but only the  
12 Township can zone. And so we ask that you find the five  
13 zoning subsections that were remaining for trial satisfies  
14 Central Hudson scrutiny and reject plaintiffs' demand for  
15 improper injunctive relief and enter judgment in PTP's favor.  
16 And I'm happy to take questions.

17 THE COURT: What do you make of Dr. Daniels' opinion  
18 as to one of the sequelae of the Township's efforts which was  
19 to reduce land values?

20 MS. HILLYER: So I don't think that is an entirely  
21 accurate characterization of his testimony. I understand  
22 that's what plaintiffs have said that he said.

23 THE COURT: Well, what's your understanding of what  
24 he said on that subject?

25 MS. HILLYER: So the issue is, if you have certain

1 farms -- because grape growers and wineries are not the only  
2 farms on the peninsula. You have flower growers. You have  
3 apple growers. And if you authorize uses other than  
4 agricultural production to the point where now if you are a  
5 winery and you are growing grapes and you are having weddings  
6 and you're having conventions and you're having retreats and  
7 you're opening a restaurant on your property, that is going to  
8 shift the relationship of the value of your land, and it is  
9 going to make it more difficult for other types of farmers,  
10 other types of business owners who can't do those kinds of  
11 lucrative activities to basically afford to buy land.

12 So you have -- you talk about farmers who want to pass  
13 their farm on to the next generation, and you talk about, you  
14 know, a farmer who wants to retire. Some of these, you know,  
15 some of these options might be then to turn your land into an  
16 event center and to not put grapes -- land and growing grapes  
17 anymore. Right? Like you'll grow enough grapes to have a  
18 winery so that you can have events and so that you can have a  
19 restaurant, and what Dr. Daniels is saying is that as land  
20 values go up, the Township's ability then to use purchase of  
21 development rights dollars is threatened, and purchase of  
22 development rights is an important way to preserve  
23 agriculture. It's also an important way to get farmers money  
24 to keep farms in their families, to invest in new equipment.  
25 And so as land values go up, then PDR becomes more challenging

1 and the Township can afford to purchase less -- fewer  
2 development rights. So that is part of what Dr. Daniels was  
3 testifying to.

4 THE COURT: All right. I don't have any further  
5 questions at this point, Ms. Hillyer. Thank you.

6 MS. HILLYER: Thanks, Your Honor.

7 THE COURT: Mr. Infante. I'll give everybody 10  
8 more minutes.

9 MR. INFANTE: Each or total?

10 THE COURT: Each party gets 10 more minutes.

11 MR. INFANTE: Has my clock started?

12 THE COURT: Mr. McGraw didn't even want me to give  
13 you that.

14 MR. INFANTE: I don't blame him.

15 Your Honor, I have those dates you were asking for about  
16 the joint defense agreement. So the joint defense agreement  
17 was filed ECF 395-1. The date of it is October 27, 2021. The  
18 PTP filed its Sixth Circuit appeal brief on 1-10-22, so month  
19 and a half later. And Rob Manigold, that was the first  
20 deposition. That occurred November 3, 2021, so about a week  
21 after the joint defense agreement was signed. And Ms. Deeren  
22 and Mr. Hayward I think were two days later.

23 Also note that in responding to PTP's motion for  
24 intervention, originally Peninsula Township did take the  
25 position that they were not capable of defending PTP's

1 interest in the case. That was in their filing before this  
2 Court.

3 THE COURT: Thank you.

4 MR. INFANTE: And the Sixth Circuit did cite to  
5 that.

6 THE COURT: That's what I thought, too. Go ahead.

7 MR. INFANTE: On the issue of the meeting minutes,  
8 we saw Ms. Hillyer go through a bunch of meeting minutes, but  
9 the one thing we didn't see is, you know, even there they  
10 don't really cite to specifics. It was just attorney argument  
11 about what happened there. And, again, the Township has  
12 conceded that these meeting minutes were not offered for the  
13 truth of the matter asserted.

14 On the issue of why we did not have our own land use  
15 planning expert, we did name one originally. He was deposed.  
16 But given the, you know, Mr. Daniels, given his deposition  
17 testimony and given his testimony at trial, our own expert  
18 just wasn't necessary on that. He just wasn't credible  
19 whatsoever.

20 On the issue of what Mr. Larson looked at, this issue of  
21 he didn't gather documents, just want to -- I actually have a  
22 slide I actually didn't use in this case. I took it out, but  
23 it works now. So they basically say that he should have  
24 personally collected documents, Mr. Larson. There are a bunch  
25 of cases. We've cited all these cases. Well, we cited the

1 Southland case, and I believe we cited the Coyne case to your  
2 Honor. That is not a requirement. There is no requirement  
3 that an expert personally gather documents. Courts have held,  
4 and all these courts here have held that it's reasonable for  
5 an expert to rely on a company to provide records to them or  
6 even in witness interviews in providing their opinions.

7 Counsel for Peninsula Township, he said an event hosting  
8 doesn't implicate the First Amendment. One thing that -- you  
9 know, couple issues on that. One, event hosting does  
10 implicate their conference clause claim here. It does  
11 implicate our vagueness claim here. So those are two things  
12 you've already ruled in our favor. We do not concede, and you  
13 and I went around and around about this on the first day of  
14 trial, we do not concede that your Honor's summary judgment  
15 opinion granted the Township and PTP, or actually it was PTP,  
16 not even the Township, granted PTP summary judgment on that  
17 issue. I don't want to go around and around on that.

18 But even if the Court did intend to or did grant PTP's  
19 summary judgement on that issue, under Rule 54(b) your Honor  
20 can revisit that. This is a Fifth Circuit case, *Dale v Equine*  
21 *Sports Medicine & Surgery*, 750 Fed.Appx 265. It says, quote,  
22 "Courts may reconsider a partial summary judgment opinion for  
23 any reason it deems sufficient, even in absence of new  
24 evidence or intervening change in or clarification of  
25 substantive law."

1                   Huss v King Company, 338 F.3d 647, a 2003 case from the  
2 Sixth Circuit, stands for the same proposition. In that case,  
3 the Sixth Circuit said it was appropriate for Judge Miles from  
4 this court to amend his partial summary judgment opinion based  
5 on evidence that was presented at trial. Because, like here,  
6 the party in that case had the opportunity to cross examine  
7 every one of those witnesses at trial on that issue. PTP, or,  
8 I'm sorry, Peninsula Township, cross examined all of these  
9 witnesses on that issue at trial. This was Mr. Rajsic's pitch  
10 question, you get to pitch your products, you pitch your  
11 products. He asked that question 25 times.

12                   Unless your Honor has any questions, that's all I have.

13                   THE COURT: You only used five minutes. Thank you,  
14 Mr. Infante.

15                   MR. INFANTE: I do what I can. I used an hour and  
16 10 this morning.

17                   THE COURT: Thank you. Mr. Rajsic, go ahead, sir.

18                   MR. RAJSIC: Your Honor, I can guarantee I'm not  
19 going to use all 10 minutes.

20                   The first thing I want to address is the question  
21 regarding the meeting minutes and the hearsay objections as it  
22 relates to the meeting minutes. There was a limited hearsay  
23 objection as it relates to public comments during the meeting  
24 minutes. That was the objection regarding, are we offering  
25 those statements to prove the truth of the matter asserted.

1           That was the issue that was resolved at trial is are those  
2           public statements being offered to prove the truth of the  
3           matter asserted. The larger meeting minutes themselves are  
4           admissible as governmental records. So I think it's important  
5           to note that it's a very -- was a very limited issue that was  
6           addressed on whether or not it was a -- being offered to prove  
7           the truth of the matter asserted.

8           And I also want to touch briefly on Mr. Infante's last  
9           argument as it relates to the vagueness claim again in  
10           attempting to apply the vagueness claim to the hours of  
11           operation. That issue was resolved, we argued for nearly a  
12           half hour on day one of trial, and this Court sustained the  
13           Township's objection regarding event hosting, and it was  
14           not -- that argument was not just limited to the First  
15           Amendment issue. It was also related to the due process void  
16           for vagueness issue, because as we noted there has to be some  
17           sort of link under a vagueness theory to an underlying  
18           constitutional claim.

19           In this case when we look at plaintiffs' complaint, it  
20           was a First Amendment issue. And I want to note the Court  
21           sustained the Township's objection and allowed plaintiffs to  
22           make an offer of proof, and that offer of proof spiraled into  
23           a significant amount of testimony at trial regarding event  
24           hosting.

25           So, sure, we did ask questions regarding event hosting

1 because plaintiffs put on offer of proof, and I intend to ask  
2 questions at trial to elicit testimony against that.

3 Otherwise, your Honor, unless you have any questions,  
4 I'll go ahead and leave it be.

5 THE COURT: That was only two minutes. Thank you,  
6 Counsel.

7 MR. RAJSIC: Thank you, Your Honor.

8 THE COURT: Ms. Hillyer.

9 MS. HILLYER: Your Honor, I'm going for the record,  
10 and I have nothing further unless you have questions.

11 THE COURT: All right. Thank you.

12 MR. INFANTE: I do need to stand back up. I  
13 apologize. On the Rule 54(b) issue, I do want to make on the  
14 record that if the Court did rule in PTP's favor on that issue  
15 that I would make an oral motion under Rule 54(b) for the  
16 Court to revisit it. I think I need to make that for the  
17 record.

18 THE COURT: All right. Thank you.

19 MR. RAJSIC: Your Honor, I would object, obviously,  
20 to reconsidering anything that was granted prior to trial.  
21 I'm making my record.

22 THE COURT: I understand. And Ms. Hillyer, she's in  
23 the amen corner, right?

24 MR. RAJSIC: Not waiving anything but the American  
25 flag, your Honor.

1                   THE COURT: I notice you put that in your brief.

2                   MR. INFANTE: It was a good comment.

3                   THE COURT: Well, it's one of my favorites.

4                   Okay. The Court will deem the case submitted. I'll get  
5 an opinion out as soon as I can. As I said, as soon as I can.  
6 Obviously this case is very important to all the parties. The  
7 record here is very extensive as the factual record and the  
8 legal positions of the parties are pretty dense in terms of  
9 its -- the gravamen of the complaint and the defense, so I'll  
10 get it as soon as I can. Thank you very much.

11                  MR. INFANTE: Thank you, Judge.

12                  MR. RAJSIC: Thank you, your Honor.

13                  THE CLERK: All rise, please. Court is in recess.

14                  (Proceedings concluded at 12:11 p.m.)

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1 REPORTER'S CERTIFICATE  
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3 I, Lauret J. Henry, Official Court Reporter for the  
4 United States District Court for the Western District of  
5 Michigan, appointed pursuant to the provisions of Title 28,  
6 United States Code, Section 753, do hereby certify that the  
7 foregoing is a full, true and correct transcript of the  
8 proceedings had in the within entitled and numbered cause on  
9 the date hereinbefore set forth; and I do further certify that  
10 the foregoing transcript has been prepared by me or under my  
11 direction.

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/s/ Lauret J. Henry

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